(1)

Supreme Court, U.S.
FILED

95 1054 DEC 29 1995

OFFICE OF THE CLERK

No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

K.W. THOMPSON TOOL COMPANY, INC.,
Petitioner,

v.

SUSAN R. PUMPHREY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

WARREN E. JONES
NEIL D. MCFEELEY
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
300 North Sixth Street
Boise, Idaho 83701
(208) 344-8535

DANIEL W. NELSON
GIBSON, DUNN & CRUTCHER

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

10 4 pp

QUESTION PRESENTED

Whether a district court may enter summary judgment under Fed. R. Civ. P. 56 against a party *sua sponte* without providing advance notice and an opportunity to oppose summary judgment prior to its entry.

PARTIES INVOLVED

Petitioner is K.W. Thompson Tool Company, Inc., a New Hampshire corporation dba Thompson Center Arms.[1] Respondent is Susan R. Sparks Pumphrey, individually and as guardian ad litem for Tedward O'Ryan Sparks and David Erik Sparks.

---

[1] Petitioner has the following parent companies: Bear Lake Holdings, Inc. and Walnut Hill Financial Company, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES INVOLVED ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

A. The Court of Appeals' Holding That A District Court May Enter Summary Judgment Against A Party *Sua Sponte* Without Notice And An Opportunity To Oppose Summary Judgment Conflicts With Decisions Of The First, Third, Fourth, Seventh and D.C. Circuits 6

B. The Question Presented Is Important And Recurring 14

C. The Decision Below Is Contrary To Rule 56 And Principles Of Fundamental Fairness 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page(s)**

American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co., 62 F.3d 574 (3d Cir. 1995) 9

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 17

Bonilla v. Nazario, 843 F.2d 34 (1st Cir. 1988) 8,18

Burlington N. R.R. Co. v. Omaha Pub. Power Dist., 888 F.2d 1228 (8th Cir. 1989) 11

Capuano v. United States, 955 F.2d 1427 (11th Cir. 1992) 13

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 7,14,17

Chambers Dev. Co. v. Passaic Counties Util. Auth., 62 F.3d 582 (3d Cir. 1995) 8

Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162 (2d Cir. 1991) 11

Cool Fuel, Inc. v. Connett, 685 F.2d 309 (9th Cir. 1982) 7

Easterwood v. CSX Transp., Inc., 933 F.2d 1548 (11th Cir. 1991), *aff'd on other grounds*, 113 S. Ct. 1732 (1995) 12

Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98 (6th Cir. 1995) 10

English v. Cowell, 10 F.3d 434 (7th Cir. 1993) 9,14

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 401 (1981) 15

Fountain v. Filson, 336 U.S. 681 (1949) 18

In re Harris Pine Mills, 44 F.3d 1431 (9th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995) 7

Interco Inc. v. National Sur. Corp., 900 F.2d 1264 (8th Cir. 1990) 12

Jardines Bacata, Ltd. v. Diaz-Marquez, 878 F.2d 1555 (1st Cir. 1989) 8

Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000 (8th Cir. 1991) 12

Jones v. Automobile Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990) 12

Lankford v. Idaho, 500 U.S. 110 (1991) 1,14

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 28 F.3d 1388 (5th Cir. 1994) 10

Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988) 9

Matsushita Elec. Indus. Corp. v. Zenith Radio, 475 U.S. 574 (1986) 17

McBride v. Merrell Dow and Pharmaceuticals, Inc., 800 F.2d 1208 (D.C. Cir. 1986) 9

Miller v. United States, 945 F.2d 1464 (9th Cir. 1991) 16

National Union Fire Ins. Co. v. Turtor, 892 F.2d 199 (2d Cir. 1989) 16

Nowlin v. Resolution Trust Corp., 33 F.3d 498 (5th Cir. 1994) 10

Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903 (3d Cir. 1994) 8

Peckman v. Thompson, 966 F.2d 295 (7th Cir. 1992) 9,15,20

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) 15

Powell v. United States, 849 F.2d 1576 (5th Cir. 1988) 10,14

Prochaska v. Marcoux, 632 F.2d 848 (10th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981) 16

Routman v. Automatic Data Processing, Inc., 873 F.2d 970 (6th Cir. 1989) 10

Sawyer v. United States, 831 F.2d 755 (7th Cir. 1987) 20-21

Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 945 F.2d 53 (2d Cir. 1991) 11

Shur-Value Stamps, Inc. v. Phillips Petroleum Co., 50 F.3d 592 (8th Cir. 1995) 12

Stella v. Town of Tewksbury, 4 F.3d 53 (1st Cir. 1993) 8,14,18,20-21

Union Nat'l Bank v. Federal Nat'l Mortgage Ass'n, 860 F.2d 847 (8th Cir. 1988) 12

United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989) 9

United States v. Grayson, 879 F.2d 620 (9th Cir. 1989) 6,7,18

Universal Oil Prod. Co. v. Root Refining Co., 328 U.S. 575 (1946) 15

Washington v. Resolution Trust Corp., 68 F.3d 935 (5th Cir. 1995) 10

Waterbury v. T.G. & Y. Stores Co., 820 F.2d 1479 (9th Cir. 1987) 7

Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984) 10

Young v. Quinlan, 960 F.2d 351 (3d Cir. 1992) 16

Statutes and Rules:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1332 2

Fed. R. Civ. P. 56 ..... *passim*

Other Authorities

Joan M. Hall and Scott C. Tomassi, *Standards Governing Summary Judgments in Federal Court: The Supreme Court's Decisions in Matsushita, Anderson and Celotex, Current Problems in Federal Civil Practice 1988*, Prac. L. Inst. (Dec. 1, 1988) 17

Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73 (1990) 17

Kent Sinclair and Patrick Hanes, *Summary Judgment: A Proposal For Procedural Reform In The Core Motion*, 36 Wm. and Mary L. Rev. 1633 (1995) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner K.W. Thompson Tool Company, Inc. ("Thompson"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

This case presents an important, recurring question that has divided the circuits. Although Rule 56(c) of the Federal Rules of Civil Procedure expressly requires that a summary judgment motion be served "at least 10 days before the time fixed for a hearing," the Ninth Circuit in this case affirmed the district court's *sua sponte* order of summary judgment against Thompson on the fundamental issue in the case -- whether Thompson had committed a "fraud upon the court" during prior litigation -- even though Thompson had no advance notice that the district court was contemplating taking such action and no opportunity to oppose entry of summary judgment on that issue. The Ninth Circuit's rule that summary judgment can be granted *sua sponte* with no notice conflicts with decisions of the First, Third, Fourth, Seventh and D.C. Circuits, which hold that advance notice always must be provided.

"[F]air notice [i]s the bedrock of any constitutionally fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 121 (1991). Especially because the question presented arises so frequently in the federal courts, the Court should grant review in this case to resolve the conflict and to make clear that a district court must provide notice before *sua sponte* entering summary judgment against a party.

OPINIONS BELOW

The court of appeals' August 1, 1995 decision affirming the judgment of the district court is reproduced at Appendix ("App.") 1a-11a, and is reported at 62 F.3d 1128. The court of appeals' August 31, 1995 order denying the petition for rehearing and suggestion for rehearing *en banc* is reproduced at App. 69a, and is not reported. The district court's March 7, 1994 Judgment on Decision by the Court is reproduced at App. 70a-71a, and is not reported. The district court's February 11, 1994 Memorandum Decision and Order is reproduced at App. 12a-20a, and is not reported. The district court's May 4, 1993 Memorandum Decision and Order is reproduced at App. 21a-68a, and is not reported.

JURISDICTION

The jurisdiction of the district court was based upon 28 U.S.C. § 1332. The jurisdiction of the court of appeals was based upon 28 U.S.C. § 1291. The judgment of the court of appeals was entered on August 1, 1995. A timely petition for rehearing was denied on August 31, 1995. App. 69a. On November 16, 1995, Justice O'Connor granted an extension of time within which to file a petition for a writ of certiorari to and including December 29, 1995. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

This petition principally involves Rule 56 of the Federal Rules of Civil Procedure, which is set out verbatim at App. 72a-74a.

STATEMENT OF THE CASE

This litigation began in 1980 when respondent Susan R. Sparks Pumphrey, in her individual capacity and as guardian ad litem for her two children, filed a wrongful death action against Thompson in the United States District Court for the District of Idaho. Ms. Pumphrey alleged that her husband had been killed in a hunting accident when he purportedly dropped a Thompson-made Contender handgun and it discharged. *See* App. at 21a.

In 1982, a jury returned a verdict in Thompson's favor, finding the decedent 80% contributorily negligent. *Id.* at 2a. Ms. Pumphrey appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the verdict in 1984. *Id.* at 21a.

Six years later, Ms. Pumphrey filed an independent action under Rule 60(b) of the Federal Rules of Civil Procedure seeking to set aside the final judgment that had been rendered in Thompson's favor in the wrongful death action. *Id.* at 3a. Ms. Pumphrey contended that reopening that judgment was justified because the judgment was "unconscionable" and because Thompson had engaged in a "fraud upon the court" in the earlier action by allegedly scheming to suppress information relating to a certain videotape depicting testing of the Contender handgun. *See id.* at 56a-57a, 64a.[2]

---

[2] Ms. Pumphrey alleged that Thompson intentionally did not produce this videotape during discovery, knowingly gave false answers to interrogatories concerning events depicted on this videotape, and suborned perjured testimony at trial concerning events depicted on this videotape. *See* App. at 5a-7a. Throughout the proceedings below, Thompson denied all of the allegations of fraudulent conduct, contending that it did not know of the videotape's existence at the time of trial and did not

On March 11, 1992, Thompson moved for summary judgment, focusing principally on the legal question whether its in-house general counsel, Edward H. Bartlett, was "an officer of the court" for purposes of the fraud upon the court doctrine, which has been construed by many courts to require participation by an officer of the court to permit disturbing a final judgment. *See id.* at 27a-49a. Thompson also contended that, even if its general counsel technically qualified as an "officer of the court," it was entitled to summary judgment because "there is no evidence that [he] committed any fraud on the court." Memorandum in Support of Motion for Summary Judgment at 37.

Ms. Pumphrey opposed Thompson's motion. She also moved for partial summary judgment on several specific issues, including (1) whether Thompson's general counsel had been an officer of the court in the underlying wrongful death action and (2) whether Thompson's affirmative defenses should be stricken. *See* App. at 22a. Ms. Pumphrey later moved for summary judgment to set aside the judgment as "unconscionable," specifically stating that she was entitled to relief on this ground "irrespective of whether Thompson's conduct was technically fraud on the Court." Plaintiffs' Memorandum Supporting Motion For Summary Judgment at 2. *See also* App. at 22a. Ms. Pumphrey did *not*, however, move for summary judgment on the crucial issue whether Thompson had committed a "fraud upon the court." *See* App. at 5a n.1. Indeed, Ms. Pumphrey *opposed* Thompson's motion for summary

---

learn of its existence until 1988, that its interrogatories were neither intentionally nor materially inaccurate, and that its employees did not give false testimony concerning the events portrayed on the videotape that Ms. Pumphrey maintained had been improperly withheld during the 1982 trial.

judgment on that issue, *see* Memorandum Opposing Summary Judgment at 13-21, and disputed a host of material issues of fact relating to her fraud upon the court allegations.[3]

On May 4, 1993, the district court denied Thompson's motion for summary judgment and -- without providing any notice to Thompson of its intentions -- *sua sponte* granted summary judgment *against* Thompson on the issue of "fraud upon the court." App. at 64a-65a. On that basis alone,[4] the court set aside the judgment in the wrongful death action and ordered a new trial of that action. *Id.* at 13a, 65a.

Thompson filed a motion to alter or amend the district court's order and decision, contending, among other things, that the entry of summary judgment against it *sua sponte*

---

[3] For example, Ms. Pumphrey submitted a statement of material facts that stated that it was necessary "to dispute the statement filed by [Thompson]." Plaintiffs' Statement of Material Facts at 1-2. In that statement, Ms. Pumphrey disputed material facts relating to the issue whether any fraudulent conduct occurred. *See, e.g., id.* at 4-6, 15; *see also* Plaintiffs' Memorandum Supporting Motion for Summary Judgment at 3 ("Plaintiffs have opposed Thompson's motion by disputing several of Thompson's statements of fact."). Moreover, Ms. Pumphrey's opposition to Thompson's motion for summary judgment recognized that the parties were advancing diametrically opposed versions of the facts relating to the videotape at issue, repeatedly contested Thompson's factual assertions, and opposed summary judgment on the ground that Thompson's version of the facts was not "so clearly true that summary judgment should be granted." *See* Plaintiffs' Memorandum in Opposition to Summary Judgment at 13-21.

[4] The court did not address Ms. Pumphrey's assertion that the earlier judgment was unconscionable and should be set aside for that reason alone, even if no fraud had been perpetrated.

was improper. *See id.* at 12a-13a. On February 14, 1994, the district court denied Thompson's motion. Relying upon the Ninth Circuit's decision in *United States v. Grayson*, 879 F.2d 620 (9th Cir. 1989), the district court held that it was empowered to "grant summary judgment without prior notice of its intent to do so if the losing party had a 'full and fair opportunity to ventilate the issues involved in the motion.'" App. at 14a-15a. Applying this rule, the court found that its *sua sponte* summary judgment was proper, despite the lack of notice to Thompson. *Id.*

On August 1, 1995, the United States Court of Appeals for the Ninth Circuit affirmed. The court explicitly rejected Thompson's argument that "the district court erred by granting summary judgment on the issue of fraud upon the court, as [Ms. Pumphrey] did not specifically move for summary judgment on this ground." *Id.* at 5a n.1. The court of appeals, like the district court, applied the rule articulated by the Ninth Circuit in *Grayson* and held that Thompson was not entitled to advance notice that the district court intended summarily to enter judgment against it on the dispositive issue of fraud upon the court. *Id.*

On August 31, 1995, the court of appeals denied Thompson's petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals' Holding That A District Court May Enter Summary Judgment Against A Party *Sua Sponte* Without Notice And An Opportunity To Oppose Summary Judgment Conflicts With Decisions Of The First, Third, Fourth, Seventh and D.C. Circuits

Rule 56(c) of the Federal Rules of Civil Procedure provides that a district court may enter summary judgment

"if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) expressly requires that a motion for summary judgment "shall be served at least 10 days before the time fixed for a hearing . . . [and that] [t]he adverse party prior to the day of hearing may serve opposing affidavits."

While this Court has never directly decided whether the *sua sponte* entry of summary judgment is appropriate, the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), suggested that the practice is permissible only "so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326. Since *Celotex*, the courts of appeals have adopted an array of conflicting and confusing rules regarding whether a district court must provide notice and a meaningful hearing before entering summary judgment against a party *sua sponte*. Review by this Court is necessary to resolve the conflict.

Only the Ninth Circuit has held that district courts are empowered to dispense altogether with Rule 56(c)'s notice requirement. It recognizes "an exception to" Rule 56 that permits a district court to enter summary judgment *sua sponte* "without notice" if the court determines that the "losing party has had a 'full and fair opportunity to ventilate the issues involved . . . .'" *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989) (quoting *Waterbury v. T.G. & Y. Stores Co.*, 820 F.2d 1479, 1480 (9th Cir. 1987) (quoting *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982)). *See also In re Harris Pine Mills*, 44 F.3d 1431, 1439 (9th Cir.) (applying *Grayson* exception to hold that district court was not required to provide notice of its intent to enter summary judgment *sua*

sponte), *cert. denied*, 115 S. Ct. 2555 (1995). The court of appeals applied this rule in the case at bar to affirm the district court's entry of *sua sponte* summary judgment against Thompson. *See* App. at 5a n.1.

On the other hand, at least five circuits -- the First, Third, Fourth, Seventh and D.C. Circuits -- have adopted a bright-line rule that notice is an absolute prerequisite to entry of *sua sponte* summary judgment, and recognize no exception to this rule. The First Circuit, for example, has held that "the notice requirement for *sua sponte* summary judgment demands at the very least that the parties (1) be made aware of the court's intention to mull such an approach, and (2) be afforded the benefit of the minimum 10-day period mandated by Rule 56." *Stella v. Town of Tewksbury*, 4 F.3d 53, 56 (1st Cir. 1993). Similarly, in *Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988) (Breyer, J.), the court held that ordering summary judgment *sua sponte* is appropriate only if the losing party had notice and "an opportunity to tell that court precisely what they intend to prove and how, before [the court] can say that there are no 'genuine' and 'material' issues of fact." The First Circuit requires such notice and an opportunity to respond in all cases, including where, as here, the party against whom judgment was entered has itself moved for summary judgment. *See, e.g., Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1561 (1st Cir. 1989).

The Third Circuit follows the same approach as the First Circuit: "[A] judgment cannot be entered without first placing the adversarial party on notice that the court is considering a *sua sponte* summary judgment motion." *Chambers Dev. Co. v. Passaic Counties Util. Auth.*, 62 F.3d 582, 584 n.5 (3d Cir. 1995); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d

Cir. 1994) ("Under our cases, a district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose summary judgment."). Like the First Circuit, the Third Circuit has made clear that such notice and an opportunity to oppose summary judgment must always be provided, even where a party has itself moved for summary judgment. *See, e.g., American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574, 578 & n.5 (3d Cir. 1995).

Nor do the Fourth, Seventh or D.C. Circuits recognize any exception to Rule 56(c)'s notice requirement in the context of *sua sponte* summary judgment. *See, e.g., United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 735-36 (4th Cir. 1989) (a court's power to enter summary judgment *sua sponte* is "contingent on giving the losing party notice that it must come forward and defend its claim" and the notice should "provide the full ten days called for by Fed. R. Civ. P. 56(c)"); *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993) ("Unless a claim is frivolous, it is rudimentary that a court cannot *sua sponte* enter summary judgment . . . without notifying the parties of its intentions and allowing them an opportunity . . . to respond."); *Peckman v. Thompson*, 966 F.2d 295, 297-98 (7th Cir. 1992) (entry of summary judgment *sua sponte* is "improper when it comes as a surprise to the adverse party"); *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1212 & n.3 (D.C. Cir. 1986) (district court may enter summary judgment *sua sponte* only if the losing party was on sufficient notice to come forward and marshall all of its evidence against summary judgment); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.) (district court may consider summary judgment on its own initiative, but only after giving proper notice), *cert. denied*, 488 U.S. 825 (1988).

Some circuits will affirm the entry of *sua sponte* summary judgment absent notice in limited circumstances on a case-by-case basis. The Fifth Circuit requires that a district court give advance notice of its intention to enter summary judgment *sua sponte*, but it will excuse failure to give such notice where the error can be deemed "harmless." *See, e.g., Washington v. Resolution Trust Corp.*, 68 F.3d 935, 939-40 (5th Cir. 1995) (declaring that "[d]istrict courts can enter summary judgment *sua sponte*, so long as the losing party has ten days notice to come forward with all of its evidence," but reviewing failure to give notice as required under Rule 56 for "harmless error"); *accord Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504-05 (5th Cir. 1994) (failure to give notice before entry of *sua sponte* summary judgment deemed harmless error); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 28 F.3d 1388, 1397-98 (5th Cir. 1994) (same); *Powell v. United States*, 849 F.2d 1576, 1580 (5th Cir. 1988) (lack of notice was not harmless error where the party against whom summary judgment was entered "contended that there was a genuine issue of material fact").

The Sixth Circuit takes a similar approach. That court has held that "'where a district court is contemplating entering *sua sponte* summary judgment against one of the parties, that party is entitled to unequivocal notice of the court's intentions.'" *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 972 (6th Cir. 1989) (quoting *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984)). But like the Fifth Circuit, the Sixth Circuit will excuse a district court's failure to abide by the plain terms of Rule 56 if it determines on appeal that the resulting error was harmless. *See id.* at 972 (rejecting argument that lack of notice constituted harmless error "under the facts of this case"); *accord Employers Ins. of Wausau v. Petroleum*

Specialties, Inc., 69 F.3d 98, 105-06 (6th Cir. 1995) (relying on *Routman* and rejecting argument that district court's *sua sponte* summary judgment was proper irrespective of lack of notice).

The Second Circuit has adopted a middleground position. As a general matter, it mandates that district courts provide advance notice before entering summary judgment *sua sponte*. *See, e.g., Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 945 F.2d 53, 55 (2d Cir. 1991) (district court's entry of summary judgment *sua sponte* without providing notice and an opportunity to oppose summary judgment conflicts with the circuit's "established policy of adhering to the ten day notice specified in Fed. R. Civ. P. 56(c)"). But where, as here, a party has itself filed a motion for summary judgment, the Second Circuit has held that a district court "need not give notice of its intention to enter summary judgment *against* the moving party" as long as the failure to give notice does not result in prejudice. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) (emphasis in original).

Still other circuits are, themselves, in complete disarray concerning *sua sponte* summary judgment and Rule 56's notice requirements. Indeed, the Eighth Circuit is a veritable microcosm of the conflict that has divided the other circuits. In *Burlington N. R.R. Co. v. Omaha Pub. Power Dist.*, 888 F.2d 1228, 1231 n.3 (8th Cir. 1989), for example, the court applied a standard that closely resembles the Ninth Circuit's "full and fair ventilation" rule, concluding that "[i]t is within the court's power to grant summary judgment sua sponte against the moving party, lacking a cross-motion, where the party against whom the judgment is entered has had a full and fair opportunity to contest [summary judgment]." But in its most recent

decision on this subject, the Eighth Circuit seemed to apply the bright-line rule and held that *sua sponte* summary judgment is proper only where "the party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted." *Shur-Value Stamps, Inc. v. Phillips Petroleum Co.*, 50 F.3d 592, 595 (8th Cir. 1995) (quoting *Interco Inc. v. National Sur. Corp.*, 900 F.2d 1264, 1269 (8th Cir. 1990)). And, in yet another line of decisions, the Eighth Circuit prohibited *sua sponte* summary judgment altogether: "[A] district court has *no power* to order summary judgment *sua sponte* because we require 'strict compliance' with the procedural demands of Rule 56." *Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000, 1004-05 (8th Cir. 1991) (emphasis added); *accord Union Nat'l Bank v. Federal Nat'l Mortgage Ass'n*, 860 F.2d 847, 856 n.15 (8th Cir. 1988) ("this Court has consistently rejected the entry of summary judgment sua sponte by district courts").

The Eleventh Circuit has likewise expressed a variety of hopelessly conflicting positions on this question. On the one hand, it has purported to declare "a bright-line rule: If a district court fails to comply with the [Rule 56] ten-day notice requirement, the case will be reversed and remanded so that the district court may provide the non-moving party with adequate notice." *Jones v. Automobile Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1532 (11th Cir. 1990). Indeed, like the Eighth Circuit, the Eleventh Circuit has concluded that district courts are not empowered to grant summary judgment *sua sponte*. *See, e.g., Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1556 (11th Cir. 1991) ("The district court may grant summary judgment on an issue only if a party moves for summary judgment on that issue."), *aff'd on other grounds*, 113 S. Ct. 1732 (1995). In its most recent decision, however, the Eleventh Circuit

affirmed a district court's entry of summary judgment *sua sponte* without prior notice on the ground that the lack of notice constituted harmless error. *See Capuano v. United States*, 955 F.2d 1427, 1432 n.16 (11th Cir. 1992) (stating that "[i]t is generally improper to award summary judgment *sua sponte* at a Rule 16 pretrial conference without the 10-day notice mandated by Rule 56(c)," but holding that the failure to do so was harmless error).

As the foregoing discussion makes clear, the circuits are in stark conflict, and some are in a terrible state of confusion, concerning whether a district court must provide notice and an opportunity to be heard before entering summary judgment *sua sponte* against a party. In the Ninth Circuit, district courts have discretion to enter summary judgment against a party *sua sponte* without notice as long as the district court believes that the losing party has had an opportunity to "ventilate" the issues involved. The First, Third, Fourth, Seventh and D.C. Circuits apply a bright-line rule that a district court's failure to provide such notice constitutes reversible error as a matter of law. The Fifth and Sixth Circuits forbid *sua sponte* summary judgment without notice, but will excuse it as "harmless error" in limited circumstances. The Second Circuit takes the "harmless error" approach where summary judgment was entered *sua sponte* without notice against a party who itself had sought summary judgment, but invokes the bright-line rule prohibiting summary judgment without notice in all other cases. And the Eighth and Eleventh Circuits have each articulated at least three different and contradictory rules, including the rule that *sua sponte* summary judgment is never permissible.

This conflict is unnecessary and intolerable. The Court should grant review and resolve it to clarify the proper

procedures governing entry of *sua sponte* summary judgment under Rule 56.

B. The Question Presented Is Important And Recurring

The question whether a party is entitled to advance notice and a meaningful opportunity to be heard before a court, *sua sponte*, enters summary judgment against it is an important one that warrants this Court's review in this case. This Court has, "[i]n a variety of contexts, . . . repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn." *Lankford*, 500 U.S. at 126 n.22. Indeed, "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure," *id.* at 126, and is compelled by the Due Process Clauses of the Fifth and Fourteenth Amendments in both criminal and civil cases.

Ensuring that a litigant has proper notice of the issues to be resolved in the context of summary judgment proceedings is an especially important protection in civil cases. As this Court has recognized, "Rule 56 must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried . . . ." *Celotex*, 477 U.S. at 327. Rule 56(c) itself includes an express requirement that 10-day notice and an opportunity to oppose summary judgment be provided, and the "notice requirement is not mere window dressing." *Stella*, 4 F.3d at 55. "[T]he strict enforcement of the notice requirement is necessary because a summary judgment is a final adjudication on the merits," *Powell*, 849 F.2d at 1579, and the "opportunity to respond is deeply embedded in our concepts of fair play and substantial justice." *English*, 10 F.3d at 437.

The *sua sponte* grant of summary judgment is a particularly "hazardous [procedure] that warrants special caution," *Peckman*, 966 F.2d at 297, and any rule permitting courts to enter such judgments without advance notice is fraught with potential unfairness. This case is a good example. Thompson's opponent disputed many material facts and contended that summary judgment on the dispositive "fraud upon the court" issue would be improper. The district court gave no inkling that it was mulling the possibility of entering summary judgment against Thompson on that issue. Without any advance notice, the court not only summarily and finally adjudicated the "fraud upon the court" issue and reopened the decade-old final judgment in the wrongful death action,[5] but it made findings with highly damaging personal and professional consequences for Thompson's general counsel, Edward H. Bartlett, announcing that he had intentionally perpetrated a fraudulent scheme on a federal court and knowingly permitted other company officials (who themselves now

---

[5] The district court's entry of summary judgment *sua sponte* against Thompson to reopen a final judgment is particularly troubling. "This Court has long recognized that 'public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). The final judgment that was affirmed on appeal in 1984 created a property right that could not be taken away from Thompson in the absence of due process safeguards. *Cf. Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995). Indeed, this Court has held that where a court considers exercising its historic power to reopen a final judgment purportedly obtained by fraud "the usual safeguards of adversary proceedings must be observed" and therefore "a court cannot deprive a successful party of his judgment without a proper hearing." *Universal Oil Prod. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946).

effectively have been branded liars by a federal judge) to commit perjury. The district court reached these extraordinary conclusions without ever hearing any testimony from Mr. Bartlett and the other company officials concerning their activities and state of mind,[6] and without affording Thompson the opportunity to submit any opposing affidavits or to marshall its evidence and arguments against summary judgment as required by Rule 56. Had the district court provided Thompson with notice and such an opportunity, Thompson believes that the court could never have reached the factual conclusions that it did. *See infra* note 9.

---

[6] The key issue in the case was Thompson's intent. According to the district court itself, "[t]his lawsuit is intended to address the defendant's *intentional* suppression of evidence it created; the defendant's *intentional* perjury; . . . the defendant's *intentional* frustration of the rules of discovery; and the defendant's *intentional* fraud upon the court." App. at 64a (emphasis added). Respondent was required to prove Thompson's alleged fraudulent intent by clear and convincing evidence. *See id.* at 59a. Such questions of intent are peculiarly matters of credibility for the factfinder that generally cannot be disposed of by summary judgment. *See, e.g., Young v. Quinlan*, 960 F.2d 351, 360 n.21 (3d Cir. 1992) ("When state of mind is an essential element of the nonmoving party's claim, resolution of the claim by summary judgment is often inappropriate because a party's state of mind is inherently a question of fact which turns on credibility."); *Miller v. United States*, 945 F.2d 1464, 1466 (9th Cir. 1991) ("[T]he question of wilful conduct is 'essentially a question of fact.'"); *National Union Fire Ins. Co. v. Turtor*, 892 F.2d 199, 205 (2d Cir. 1989) (questions of intent are "usually inappropriate for disposition on summary judgment"); *Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980) ("questions of intent, which involve intangible factors including witness credibility, are matters for consideration of the fact finder . . . ."), *cert. denied*, 451 U.S. 984 (1981).

The question whether notice is required before entry of *sua sponte* summary judgment arises frequently in the federal courts, as demonstrated by the numerous conflicting decisions discussed above. More generally, issues concerning summary judgment are highly significant to the federal judicial process given the substantial number of cases evaluated pursuant to Rule 56.[7] The importance of guidance on the summary judgment issue presented by this case is magnified by the fact that this Court's 1986 decisions in *Celotex*, 477 U.S. 317, *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Corp. v. Zenith Radio*, 475 U.S. 574 (1986), have been widely perceived as encouraging use of summary judgment both by parties and by trial courts.[8] The recurring nature of the question presented in this case and the fact that the existing conflict among the circuits over this question seems

---

[7] Indeed, a recent empirical study found that in 1993 there were more than 8,000 federal district court opinions reported on LEXIS that addressed the subject of summary judgment. Kent Sinclair and Patrick Hanes, *Summary Judgment: A Proposal For Procedural Reform In The Core Motion*, 36 Wm. and Mary L. Rev. 1633, 1659 (1995). This figure is particularly striking in view of the fact that there are, on average, only slightly more than 8,000 civil trials conducted annually by the federal judiciary. *See id.* at 1663.

[8] *See, e.g.*, Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73, 93 (1990) ("the Supreme Court trilogy encourages the grant of summary judgment through an expansive view of the role of the trial court in determining what issues merit presentation to the ultimate trier of fact"); Joan M. Hall and Scott C. Tomassi, *Standards Governing Summary Judgments in Federal Court: The Supreme Court's Decisions in Matsushita, Anderson and Celotex, Current Problems in Federal Civil Practice 1988*, Prac. L. Inst. (Dec. 1, 1988) ("there is universal agreement that the three cases encourage the use of summary judgment by courts and practitioners").

only to be worsening with time, militates strongly in favor of this Court's review.

C. The Decision Below Is Contrary To Rule 56 And Principles Of Fundamental Fairness

The Ninth Circuit's decision below affirming the district court's entry of summary judgment *sua sponte* is plainly contrary to Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) explicitly requires 10 days advance notice of a motion for summary judgment so that a party may have a meaningful opportunity to submit opposing affidavits and other arguments against summary judgment. Contrary to the Ninth Circuit's holdings, the rule contains no "exception," *Grayson*, 879 F.2d at 625, to these requirements, and for good reason. "Proper notice affords parties opposing summary judgment the opportunity to inform the 'court precisely what they intend to prove and how, before [the court] can say there are no 'genuine' and 'material' issues of fact.'" *Stella*, 4 F.3d at 55 (quoting *Bonilla*, 843 F.2d at 37); *see also Fountain v. Filson*, 336 U.S. 681, 683 (1949) (reversing court of appeals' *sua sponte* order granting summary judgment against a defendant who had moved for and obtained summary judgment in the trial court on the ground that "it was error for [the court of appeals] to deprive [the defendant] of an opportunity to dispute the facts material to [the plaintiffs'] claim by ordering summary judgment against her").[9]

---

[9] Thompson had no motive or opportunity to identify material issues of disputed fact concerning the "fraud upon the court" issue in this case prior to the district court's *sua sponte* entry of summary judgment. Thompson, which did not have the burden of proof on that issue, contended that respondent had produced "no evidence" of intentional wrongdoing by Thompson or its officers and employees and that *it* was entitled to summary judgment on that basis. Contrary to the Ninth Circuit's

To the extent that district courts may decide to enter summary judgment *sua sponte*, rather than in response to the filing of a motion by a party, strict adherence to Rule 56(c)'s notice requirements is all the more important. Indeed, nothing in the rule itself even suggests that district courts are empowered to grant summary judgment *sua sponte*,[10] and it is a process that has rightly been

---

suggestion,' App. at 5a n.1, had Thompson known that the district court was contemplating entering summary judgment on that issue, it would have had every reason to take a quite different approach during the district court proceedings. Among other things, it could have demonstrated in detail to the district court why and how material factual disputes precluded summary judgment in favor of respondent in the event the district court rejected Thompson's argument that respondent as a matter of law could not establish by clear and convincing evidence that Thompson had committed fraud upon the court.

Moreover, following the district court's *sua sponte* order, Thompson repeatedly asserted, both in the Ninth Circuit and in the district court, that it had not had an adequate opportunity to oppose the entry of summary judgment and provided examples of the material factual disputes that precluded summary judgment against it on the issue of "fraud upon the court." *See, e.g.*, Appellant's Brief (9th Cir.) at 23-27; Defendant's Response To Plaintiffs' Objection To Defendant's Motion To Alter Or Amend Judgment at 2 ("Thompson did not have an opportunity to respond to any claim for summary judgment based on fraud."); *id.* at 4-5 ("summary disposition by the Court without an evidentiary hearing and without notice of the possibility that summary judgment would be granted against Thompson on the basis of fraud violates the notions of due process required by the United States Supreme Court in these types of cases").

[10] As noted above, this Court in dicta in *Celotex* remarked on the fact that district courts widely engaged in the practice of granting *sua sponte* summary judgment. Nothing in Rule 56,

characterized as "hazardous." *Peckman*, 966 F.2d at 297. As the Seventh Circuit has explained, "This hazard exists due to the fact that *sua sponte* dismissals . . . conflict with traditional adversarial concepts of justice to the extent that they make the district court 'a proponent rather than an independent entity.'" *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987) (citation omitted). Allowing district courts to jettison Rule 56's notice requirements seriously aggravates this problem, not only involving the district court as a "proponent" of summary judgment, but denying a litigant the opportunity to challenge the district court's decision to enter summary judgment before the court has made up its mind.

There also are sound practical reasons to reject the Ninth Circuit's exception to the Rule 56 notice requirement. While it hardly can be argued that merely providing the notice required by the rule will significantly complicate summary judgment adjudications, no purpose is served by denying a party notice and an opportunity fully to respond before a court *sua sponte* grants summary judgment against it. "Although summary judgment is a useful shortcut leading to final adjudication on the merits in a relatively small class of cases, its proper province is to weed out claims that do not warrant trial rather than simply to clear a court's docket." *Stella*, 4 F.3d at 55. And permitting *sua sponte* summary judgments without notice

---

however, authorizes that practice. In fact, the Rule authorizes only motions filed by "[a] party seeking to recover upon a claim" or "[a] party against whom a claim . . . is asserted." Fed. R. Civ. P. 56(a)-(b). Accordingly, panels of both the Eighth and Eleventh Circuits have held that *sua sponte* summary judgment simply is not permitted under Rule 56. *See supra* pages 11-13.

"may ultimately waste, rather than economize, judicial resources, by producing appeals and remands that might have been avoided." *Sawyer*, 831 F.2d at 759.

In short, the plain terms of Rule 56 require 10 days advance notice of a summary judgment motion, and provide for no exception for *sua sponte* summary judgment motions. Therefore, "summary judgment targets should be secure in the knowledge that they will have at least ten days in which to formulate and prepare their best opposition to an impending motion." *Stella*, 4 F.3d at 55.

CONCLUSION

The petition for a writ of certiorari should be granted and this case set for plenary consideration.

December 29, 1995

Respectfully submitted,

*Theodore B. Olson
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

Of Counsel:

Warren E. Jones
Neil D. McFeeley
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
300 North Sixth Street
Boise, Idaho 83701
(208) 344-8535

Daniel W. Nelson
GIBSON, DUNN & CRUTCHER

APPENDIX

Susan R. PUMPHREY, Plaintiff-Appellee,

v.

K.W. THOMPSON TOOL CO., a new Hampshire Corporation d/b/a Thompson Center Arms, Defendant-Appellant.

Nos. 94-35281, 94-35285.

United States Court of Appeals, Ninth Circuit

Argued and Submitted May 4, 1995.

Decided Aug. 1, 1995

R.B. Kading, Jr., Warren E. Jones, Neil D. McFeeley, Eberle, Berlin, Kading, Turndow & McKlveen, Boise, ID, for defendant-appellant K.W. Thompson Tool Co.

Jeffrey A. Strother, Lojek, Gabbert & Strother, and W. Anthony Park, Park, Redford, Thomas & Burkett, Boise, ID, for plaintiff-appellee Susan R. Sparks Pumphrey.

On appeal from the United States District Court for the District of Idaho.

Before: SKOPIL, FERGUSON, and THOMPSON, Circuit Judges.

SKOPIL, Senior Circuit Judge:

We review in this appeal a district court's decision to set aside a verdict in favor of a defendant in a wrongful death action after the court discovered that defendant's in-house counsel participated in a scheme to defraud the court. The court ordered a new trial over defendant's objection that its conduct did not rise to the level of fraud upon the court, and even assuming that it did, that a new trial should be

limited solely to the issue of liability. We agree with the district court that defendant's actions constituted fraud on the court, and that a new trial on all issues is appropriate. Accordingly, we affirm.

I.

Melvin Sparks was killed when de dropped a Thompson P.C. Contender handgun and it fired, sending a bullet through his heart. Sparks' widow and children ("Sparks") brought a wrongful death action against the gun manufacturer, K.W. Thompson Tool Company ("Thompson"), alleging that the gun's internal and external safety devices were engaged at the time of the accident, but that the gun nevertheless fired when dropped.

At trial, Thompson introduced a videotape ("trial video") showing the Contender dropped from various heights and angles. The trial video shows that during the tests, the safeties performed as designed, and the gun never fired. Thompson's production manager, Kendrick French, conducted the tests. Also present were Thompson's vice president and general counsel, Edward Bartlett, and Thompson's president, Robert Gustafson. The jury found that plaintiffs suffered $100,000 in damages, but that the decedent was 80% contributorily negligent.

The present action arises as a result of a subsequent, unrelated lawsuit in which another plaintiff claimed injuries resulting from a dropped Thompson Contender. In this lawsuit, a second video ("original video") was produced during discovery, showing that the Contender fired when dropped during testing. This video was prepared by Thompson on the same day as the trial video, but was never produced during the *Sparks* litigation. A magistrate judge conducting a settlement conference in the later lawsuit learned that the original video was never produced in *Sparks*, and that Thompson's expert witness, Kendrick

French, testified several times in *Sparks* that he had conducted drop-tests of the Contender but it had never fired. The magistrate judge reported these facts to the federal District Court in Idaho; Sparks' attorney was thereafter informed.

Sparks filed this independent action pursuant to Federal Rule of Civil Procedure 60(b), seeking to set aside the *Sparks* verdict. The district court granted summary judgment in favor of *Sparks* on the ground that Bartlett was an officer of the court and had committed fraud upon the court. The district court further held that even if Bartlett was not an officer of the court, the conduct was sufficient to constitute fraud upon the court. The district court set aside the verdict, ordered a new trial, and awarded attorney's fees.

II.

Federal Rule of Civil Procedure 60(b) provides that a judgment may be set aside for fraud upon the court. One species of fraud upon the court occurs when an "officer of the court" perpetrates fraud affecting the ability of the court or jury to impartially judge a case. *See In re Intermagnetics American, Inc.*, 926 F.2d 912, 916 (9th Cir. 1991); *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989). Thompson first contends that Bartlett was not an "officer of the court" for purposes of the *Sparks* litigation.

Commencing in April, 1982, Edward Bartlett was general counsel and vice president of Thompson. He was not admitted to practice in the District of Idaho, where the *Sparks* trial occurred. He did not enter an appearance in *Sparks*, was not admitted *pro hac vice*, and did not sign any documents filed with the court. Rather, Thompson was represented at trial by local counsel from Idaho.

We note, however, that Bartlett participated significantly in *Sparks* by attending the trial on Thompson's behalf, gathering information to respond to discovery requests and framing the answers, and participating in the videotaping of both the trial video and the original video. Additionally, Bartlett retained possession of both the trial video and original video after they were made. No one at Thompson differentiated between Bartlett's activities as vice president and his activities as general counsel.

We agree with the district court that Bartlett's participation in *Sparks* was sufficient to render him an officer of the court. *Cf. NCK Organization, Ltd. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976) (house counsel, who was also vice president and director, may not avoid disqualification from a matter "at least where circumstances indicate that [his] participation consisted of more than action simply in an officer's capacity"); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 381 (S.D. Tex. 1969) (law firm was disqualified from matter due to level of participation in case, notwithstanding firm's failure to enter an appearance). Thompson offers no sound reason why an attorney's participation in a case should not render him an officer of the court. The authority offered by Thompson in support of its position stands only for the propositions that attorneys have a duty to the courts before which they practice, and that courts have the corresponding authority to discipline attorneys who practice before them. *See e.g., In re Snyder*, 472 U.S. 634, 643 (1985) (courts have inherent authority to discipline lawyers which "derives from lawyer's role as an officer of the court which granted admission"); *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (ethical rules of a federal court apply to attorney appearing before a federal court even if state rules differ). Therefore, we conclude that Bartlett was an officer of the court in the *Sparks* litigation.

Thompson next contends that Bartlett's actions do not constitute fraud upon the court.[1] We disagree. "[F]raud upon the court includes both attempts to subvert the integrity of the court and fraud by an officer of the court." *Intermagnetics*, 926 F.2d at 916. Furthermore, it "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Abatti v. Commissioner*, 859 F.2d 115, 118 (9th Cir. 1988) (internal quotation omitted). Based upon the following undisputed facts, we agree with the district court's conclusion that Thompson, through Bartlett, perpetrated fraud upon the court.

Thompson made two videotapes approximately two months before trial. During the filming of the "original" video, while the Contender's internal safety was being tested, the gun fired after it was dropped. During the filming of the "trial" video, while the internal safety was being tested, the gun did not fire when dropped. The trial video was made because the test shown on the original video did not turn out as planned. French and Bartlett were present at the filming of these videos. Bartlett had possession of these videos after they were made, yet he

---

[1] Thompson argues that the district court erred by granting summary judgment on the issue of fraud upon the court, as Sparks did not specifically move for summary judgment on this ground. Thompson, however, raised the issue of fraud upon the court in its own motion for summary judgment, and fully aired its position on the issue. Moreover, Thompson fails to indicate a single argument or piece of evidence that it did not have the opportunity to present. Accordingly, the district court did not err by considering summary judgment on this issue. *See United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989).

never disclosed the existence of the original video to trial counsel for Thompson.

Prior to filming the videos, Thompson answered a request for production by stating that "defendant is not presently aware of any records relating to the testing of the Thompson Contender handguns. If records are later discovered, they will be made available pursuant to this request." Contrary to that statement, however, the original video was never disclosed to Sparks at any time, despite the fact that Bartlett participated in filming the video, had possession of the video, and drafted later discovery responses.

Barely one month after the drop-tests were conducted, Bartlett drafted an answer to Sparks' interrogatories which mischaracterized the drop-tests. The answer admitted that during one test the Contender fired when dropped, but misstated that the drop was from five feet rather than three feet. The answer further misstated that both safeties were intentionally disengaged, when in fact the internal safety was *unintentionally* disengaged. The answer also misstated that there was no record of the test.

Bartlett attended the trial at which French testified several times, without qualification, that he had never seen the Contender fire when dropped during tests. Additionally, French was deposed in two cases subsequent to Sparks involving the same gun. Bartlett was present at both depositions. In one case, French stated that he had never been able to engage the internal safety, disengage the external safety, and then drop the gun and have it fire. In another case, French stated that he had been able to jar the safety out of place when dropping the gun but had not been able to make it fire.

These undisputed facts reveal that Thompson, through Bartlett, engaged in a scheme to defraud the jury, the court,

and Sparks, through the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impression created by French's testimony. The end result of the scheme was to undermine the judicial process, which amounts to fraud upon the court. *Cf. Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245-46 (1944) (deliberately planned scheme to present fraudulent evidence constitutes fraud upon the court), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, (1976); *Abatti*, 859 F.2d at 118 (fraud upon the court involves unconscionable plan or scheme to improperly influence the court).

Thompson argues, however, that there was no fraud upon the court because Bartlett believed the original video was taped over, and in 1982, no one at Thompson thought that a videotape was a "document" or "record." Even taking the above as true, we nonetheless conclude that there is ample evidence of fraud upon the court. Bartlett said nothing when trial counsel argued that the trial video should be admitted, because the test was not "staged or rigged or anything else." French added to the deception at trial when he engaged in the following colloquy regarding the making of the trial video:

"Q. Was there any attempt to alter or modify that video tape or edit it?

A. No, sir, there was not.

Q. Does the video tape fairly and accurately portray the tests you did with the dropping of the gun?

A. Yes, it does."

Bartlett, who knew that French's answers were false because he was present at the taping, failed to take action regarding French's false answers at trial and in subsequent

depositions. Additionally, Bartlett provided a misleading answer to the interrogatory regarding the drop-test.

Thompson further contends that regardless of whether the videotape was knowingly withheld, there was no fraud upon the court because the original video was not material to the issues in Sparks because it revealed only what Thompson's experts conceded at trial; namely, that the internal safety could disengage if the gun was dropped, and that the gun could fire if dropped with both safeties off. We reject this argument for two reasons. First, it is not as clear as Thompson suggests that the video is immaterial. Thompson appears to argue that the original video shows the gun firing after the internal safety was unintentionally disengaged during a prior drop. Review of the transcript, however, reveals that it is equally plausible that the safety disengaged and the gun fired on the same drop. This is, of course, why it should not have been concealed from the plaintiff or the jury.

Second, Thompson's argument misses the point. The issue here is not whether Sparks would have prevailed had the original video been produced. As we noted in *Intermagnetics*, "the inquiry as to whether a judgment should be set aside for fraud upon the court under Rule 60(b) focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity of the judicial process." *Intermagnetics*, 926 F.2d at 917 (citing *Hazel-Atlas*, 322 U.S. at 264). By failing to disclose the original video, mischaracterizing the results of the drop-tests, and failing to correct the false impression created by French's testimony, Bartlett undermined the judicial process. As the district court noted, Bartlett, as a licensed attorney, "is aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility. He is aware of the damage failure to abide by these rules can

wreck in the specific case at hand and the larger framework of confidence in the adversary trial system." Moreover, Thompson is in no position to dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict. *See Hazel-Atlas* at 246-47, (holding that party who presented fraudulent evidence cannot disclaim its effectiveness after the fact).

Thompson further argues that the interrogatory answers regarding the drop-test contained only immaterial and technical inaccuracies, and thus, are insufficient to support a finding of fraud. We disagree. The issue in *Sparks* was whether the Contender could fire when dropped with one or both safeties engaged. Thus, contrary to Thompson's assertion, whether the internal safety was intentionally or unintentionally disengaged, and whether there was any record of the test, likely affected Sparks' pursuit of discovery.

Nor do we agree with Thompson that Sparks' failure to uncover the alleged fraud, after receiving Thompson's interrogatory answers admitting that the gun fired during a drop test, should bar this action. Thompson's conduct during discovery assured that Sparks would have no reason to pursue discovery regarding the drop-tests. We note that Thompson failed to update the request for production, and also filed a misleading interrogatory answer regarding its drop-tests. We further note that Thompson did not reveal the fact that the gun fired during a drop-test until less than a month before trial. In addition, Thompson successfully pursued a protective order precluding the deposition of Bartlett and others at Thompson after the drop-test occurred, but before the results were revealed to Sparks. This order made it clear that the only remaining discovery was to be Thompson's answers to Sparks' interrogatories.

Moreover, even assuming that Sparks was not diligent in uncovering the fraud, the district court was still empowered

to set aside the verdict, as the court itself was a victim of the fraud. In *Hazel-Atlas* the Supreme Court reasoned that:

> even if Hazel did not exercise the highest degree of diligence [the] fraud cannot be condoned for that reason alone. This matter does not concern only private parties. . . . [and] tampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas, 322 U.S. at 246,.

Accordingly, Sparks' failure to uncover the fraud during Sparks does not bar this action.

III.

Thompson argues that a new trial should be limited to the issue of liability, because any fraud that occurred did not relate to the issue of damages. We disagree. Partial trials "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from others that a trial of it alone may be had without injustice." *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, (1931). Sparks should be given the opportunity to present a complete case, unhampered by Thompson's

fraud. The district court did not abuse its discretion by ordering a new trial on all issues. *See d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 897 (9th Cir. 1977) (whether to limit issues in new trial is within trial court's discretion).

IV.

Sparks seeks attorney's fees on appeal pursuant to our inherent power to levy sanctions for abusive litigation practices. *See Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993). Our inherent powers includes the power to assess attorney's fees "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, (1991) (internal quotations omitted). Although Thompson did not prevail on appeal, we do not conclude that its arguments were presented in bad faith, vexatiously, wantonly, or for oppressive reasons. Therefore, we decline to award attorney's fees on appeal.

AFFIRMED.

IN THE UNITED STATES COURT

FOR THE DISTRICT OF IDAHO

SUSAN R. SPARKS PUMPHREY, individually and as Guardian Ad Litem for TEDWARD O'RYAN SPARKS, and DAVID ERIK SPARKS, Plaintiffs, vs. K.W. THOMPSON TOOL COMPANY, INC., a New Hampshire corporation dba THOMPSON CENTER ARMS, Defendant.	Case No. CV 90-0514-S-EJL **MEMORANDUM DECISION AND ORDER**

Before the court is the defendant's motion (docket #146) to alter or amend the court's order dated May 4, 1993 (docket #143). Additionally, the plaintiff has filed a petition for allowance of attorney fees (docket #151).

1. DEFENDANT'S MOTION TO ALTER/AMEND

This motion is made pursuant to Rules 59(e) and 52(b) of the Federal Rules of Civil Procedure.

a. The court decided issues not presented.

The defendant contends the court determined issues not presented to the court. The defendant states the issues before the court as follows:

> The extent of the plaintiff's Motions for Partial Summary Judgment and for Summary Judgment related to the status of Edward Bartlett as an officer of the Court and the issue whether even if fraud upon the Court were not proven, whether plaintiffs could have a decision in their favor based on an argument that "unconscionable conduct by Thompson is itself a reason for setting aside the original judgment, regardless of whether that conduct technically amounts to fraud on the Court."
>
> The Court's Memorandum Decision and Order goes beyond the issues presented for summary judgment by plaintiffs and grounds its decision overturning the verdict not on the issue of whether unconscionable conduct could justify the overturning of a verdict, but rather on a finding that fraud upon the court was present.

Defendant's memorandum (docket #147) at page 3.

The court maintains that fraud on the court was and is the substance of plaintiff's actions in this case. This position is borne out by review of memoranda and responsive and supportive materials filed by the defendant. Since the beginning of the present action, the defendant has defended against the plaintiff's claims on the basis that no fraud upon the court occurred. This defensive posture was taken, explained, and expanded upon in numerous documents filed by the defendant beginning with docket #3 filed on December 17, 1990, and continuing through docket #125 filed on April 15, 1992. The defendant's present position is contrary to the position it has maintained throughout this litigation.

Even if the issue of fraud upon the court were not squarely presented to the court, the court may grant summary judgment sua sponte.

> Under certain limited circumstances, a district court may issue summary judgment on its own motion. For example, *sua sponte* summary judgment is appropriate where one party moves for summary judgment and, after the hearing, it appears from all the evidence presented that there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982)."

Portsmouth Square v. Shareholders Protective Committee, 770 F.2d 866, 869 (9th Cir. 1985).

A district court may grant summary judgment without prior notice of its intent to do so if the losing party had a "full and fair opportunity to ventilate the issues involved in the motion." United States v. Grayson, 879 F.2d 620, 625 (9th Cir. 1989) with citation to Waterbury v. T.G.& Y. Stores Co., 829 F.2d 1479, 1480 (9th Cir. 1987) (Quoting Cool Fuel, supra, 685 F.2d at 312).

Here, the defendant had a full and fair opportunity to present its side of the fraud upon the court issue. In this motion, the defendant failed to indicate the existence of any evidence on this issue which wasn't presented to the court or which the court failed to note. The defendant failed to note any argument on the issue of fraud upon the court which the defendant was precluded from considering by reason of the court's prior ruling. Instead, the matters were fully aired. The court had the benefit of extensive briefing by both sides and the defendant was given, and took advantage of numerous opportunities to present its position

on the issue of fraud upon the court. This portion of defendant's motion is **DENIED**.

b. Any new trial should be limited to liability.

In the alternative, the defendant argues that even if the court were correct in granting summary judgment, the only portion of the verdict that should be set aside is the liability determination and the damages portion should be left as is.

It is impossible to know what effect the missing evidence would have on the jury. The court is not in a position to know how a jury presented with evidence which would allow a verdict as high as $900,000 chose the figure of $100,000. The court determined that crucial information was kept from the factfinder as a result of intentional acts of fraud upon the court. The affect this fraudulently concealed evidence would have had on the jury is a question the plaintiff wants answered and is a question the plaintiff has a right to have answered. The plaintiff has the right to present all of her evidence regarding damages along with the issues of liability. The impact of liability issues on damage calculations is unknown. The plaintiff is entitled to present the entirety of her case unfettered by the fraudulent conduct of the opposing party. In the previous case, the defendant was able, through fraud upon the court, to present testimony that the gun had never fired when dropped during testing. This time, the plaintiff will be able to play a videotape of a live test conducted by the defendant wherein the gun is dropped in a manner identical to that which the plaintiff's decedent dropped his gun and the gun fires. The plaintiff will be able to view the reactions of plaintiffs officers and employees to that accidental firing.

The court finds this evidence may impact deliberations on the damage issue, if any. The court further finds that the suggested bifurcation is unwarranted. Accordingly, this portion of the motion is **DENIED**.

c. The court erred in weighing evidence.

Finally, the defendant contends the court erred in granting summary judgment on the issue of fraud because such decision necessitated a weighing of the evidence. This is untrue. The court's decision necessitated a listing of the evidence. There was no weighing involved. There was no evidence to the contrary against which the evidence of fraud upon the court was to be measured. The record supports the proposition that the defendant hid evidence and lied about it on the record. The summary judgment decision became a question of law wherein the unopposed facts were inserted into an equation. The result of this legal analysis was the finding of fraud upon the court. There were no questions of fact, genuine or otherwise, material or otherwise. This aspect of the motion is **DENIED**.

Based on all of the above, the defendant's motion as stated in Docket #146 is **DENIED IN ALL RESPECTS**.

2. PUNITIVE DAMAGES

In her response to defendant's motion to alter/amend (docket #149), plaintiff asks the court to strike all of defendant's affirmative defenses as punishment for the fraud perpetrated upon the court. The plaintiff also requests the court to address the viability of a claim for punitive damages in the retrial. These issues are beyond the scope of these proceedings and are more appropriately addressed in the retrial proceeding.

3. ATTORNEY FEES

In docket #151, the plaintiff has petitioned for payment of her attorney fees incurred in the prosecution of this action in the amount of $102,072.46. This petition is made pursuant to Local Rule 54.3. Plaintiff cites the court to

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575 (1946). The Court in Universal stated:

> No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs. Sprague v. Ticonic National Bank, 307 U.S. 161, 167, 59 S.Ct. 777, 780, 83 L.Ed. 1184.

Id. at 580. This exception to the American Rule regarding awards of attorney fees in federal courts was also discussed in Chambers v. NASCO, Inc., ___ U.S. ___, 111 S.Ct. 2123, 2133 (1991). The Chambers court noted the power of federal courts to award attorney fees when the opposing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. citing Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S.240, 258-59 (1975) quoting F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974). See also, Hall v. Cole, 412 U.S. 1, 5 (1973); Newman v. Piggie Park Enterprises Inc., 390 U.S. 400, 402 n.4 (1968) (per curiam).

Here, there is no question in the opinion of this court that the defendant has acted in bad faith, vexatiously, wantonly, for oppressive reasons. The very temple of justice has been defiled by the actions of the defendant. The court can envision few circumstances where an award of fees under this exception to the American Rule would be more appropriate than it would be here.

Having determined that an award of fees is appropriate under the third exception to the American Rule, this court

does not believe it necessary to conduct a Rule 11 analysis. However, the court would note that signatures on discovery responses wherein the truth regarding the undisclosed testing captured on the video tape was withheld or misrepresented provide a firm toe-hold from which a Rule 11 analysis could proceed. Having noted this fact, the court moves on to the question of amount.

In Mr. Park's affidavit (docket #153) he outlines fees in the amount of $40,513.95. In Mr. Strother's affidavit (docket #154) he outlines fees of $52,369.26 incurred while he worked at Meuleman/Miller and fees of $9,189.25 for work done while affiliated with his present firm. Mr. Strother also references work done by Mr. Meuleman estimated to total $6,250. No claim for the amount relating to work done by Mr. Meuleman was submitted. The total of the above charges is $102,072.46. The defendant objected to the submitted memoranda of costs (docket #156). In response to objections, Mr. Park submitted an amended affidavit (docket #159) in which he outlines fees totaling $32,603.28. Also in response to objections, Mr. Strother adjusted his Meuleman/Miller fees to $52,222.24 (docket #158). The adjusted total is $94,014.77.

The court believes the defendant's legal argument on the fee issues is without merit.

The court will now address specific objections:

1. The defendant objects to claims for Mr. Meuleman's time. No such claim was made. This objection is overruled.

2. At page 5, defendant objects to certain duplications. These duplications were corrected by Mr. Park in his amended affidavit. This objection is sustained.

3. At pages 5-7 defendant objects to the inclusion of costs, particularly the inclusion of duplicated costs.

a. 1.20.92 and 2.12.92 duplications of costs. The amended claim of Meuleman/Miller outlined in docket #158 reflects a reduction to reflect the elimination of duplicated costs. This objection is sustained.

b. 2.12.92, 7.2.92, and 6.2.93 duplications of costs. The original application of Mr. Park included expenses totaling $9,436.20. After consideration of the objection of defendant, the amended request for expenses totaled $3,463.03. This objection is sustained.

c. The objections relating to costs associated with Boston depositions and travel are overruled. The court believes these costs to be reasonable and necessary in light of the fact that it appears to the court that Mr. Park and Mr. Strother have addressed separate issues in this matter.

4. The defendant objects to inclusion of attorney fees associated with the compiling and review of the memorandum and motion for costs and fees. These items were necessary to this court's decision on the plaintiff's motion and the defendant's objections. The court believes the fees, costs and expenses associated with compiling the memoranda of costs and fees and the motions for costs and fees are allowable. This objection is **OVERRULED**.

5. The defendant objects to inclusion of efforts by counsel to seek review of Mr. Bartlett's status with the Massachusetts Bar Association. The court believes these efforts impact on issues before this court. This objection is **OVERRULED**.

6. Finally, the defendant objects to an associate's charge of 12.4 hours incurred on May 30 and 31, 1991, for services related to research and conference with Mr. Strother. This entry lacks sufficient specificity for the court to determine the necessity and reasonableness of such

a charge. This objection is **SUSTAINED. The attorney fees request will be reduced by $930.**

After consideration of all objections and amendments, the court concludes an award of attorneys fees and expenses is proper in the amount of 93,084.77 [sic].

CONCLUSION

1. The defendant's motion to alter or amend (docket #146) the court's order dated August 5, 1993, is **DENIED**;

2. The plaintiff's request to include a prayer for punitive damages and to strike defendant's affirmative defenses (docket #149) are **DENIED WITHOUT PREJUDICE**;

3. The plaintiff's motion for an award of attorney fees and expenses is **GRANTED**. Defendant shall pay plaintiff, forthwith, attorneys fees and expenses totaling **$93,084.77**.

IT IS SO ORDERED.

Dated this 11th day of February, 1994.

/s/
Edward J. Lodge
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT

FOR THE DISTRICT OF IDAHO

SUSAN R. SPARKS PUMPHREY, individually and as Guardian Ad Litem for TEDWARD O'RYAN SPARKS, and DAVID ERIK SPARKS,	Case No CV 90-0514-S-EJL
Plaintiffs,	**MEMORANDUM DECISION AND ORDER**
vs.	
K.W. THOMPSON TOOL COMPANY, INC., a New Hampshire corporation dba THOMPSON CENTER ARMS,	
Defendant.	

On September 30, 1982, following a jury trial in Civil Case No. 80-1167 (Sparks I) in the District of Idaho, a verdict was entered in favor of the above defendant against the above plaintiffs. This decision was affirmed on January 6, 1984, by the Ninth Circuit Court of Appeals.

Sparks I stemmed from the death of Melvin Sparks as a result of an accident involving a handgun known as the Thompson P. C. Contender. The Contender is designed, manufactured, and distributed by defendant Thompson. The accident allegedly occurred when the decedent dropped the Contender on its butt and the gun fired. It was alleged that the gun's safety devices were engaged at the time of the fatal shooting. During discovery, the defendant produced a videotape wherein the Contender was dropped from a

variety of heights and at a variety of angles. During these tests, the safeties performed as they were designed and the Contender never fired.

In the amended complaint filed in this action (Sparks II) on March 7, 1991, the plaintiffs seek to have the judgment entered in Sparks I set aside; to have a new trial ordered in Sparks I; and for costs, fees, and other relief. The basis of the present action arises from a subsequent lawsuit wherein a plaintiff named Roby claimed injuries resulting from a dropped Contender. (Roby v. K.W. Thompson Tool Company Inc., Civil No. W88-0138(B) (S.D.Miss.1988). In Roby's suit, a second video was produced wherein a Contender fired when dropped on its butt. This video was prepared in anticipation of Sparks I, but was never produced to the plaintiffs.

Following a hearing on July 9, 1992, three motions were taken under advisement. The first is the defendant's motion for summary judgment; the second is the plaintiffs' motion for partial summary judgment holding that Edward Bartlett is an officer of the court and holding that the six affirmative defenses asserted by the defendant are without merit; and the third is plaintiffs' motion for summary judgment regarding the plaintiffs' request for relief from the judgment in Sparks I and for a new trial. The present independent action (Sparks II) was filed pursuant to the saving clause found in Rule 60(b), Federal Rules of Civil Procedure. This clause states: "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or other proceeding, . . . or to set aside a judgment for fraud upon the court."

The Summary Judgment Standard

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides,

in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S.C.S. Court Rules, Rule 56(c), Federal Rules of Civil Procedure (Law. Co-op 1987).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party fails to make such a showing on any essential element of his case, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.[2]

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be *both* "material" and "genuine." An issue is "material" if it

---

[2] *See also* Rule 56(e), which provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

U.S.C.S. Court Rules, Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1991).

affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting* First Nat'l Bank v. Cities Serv. Co., Inc., 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g.*, British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must bake a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non- moving party's claim implausible.

Id. at 374 (citation omitted).

DISCUSSION

This independent action is based upon an alleged fraud upon this court committed by the defendant during Sparks I as the term "fraud upon the court" is found in Rule 60(b).

There is a debate as to whether 60(b) fraud upon the court must be extrinsic fraud or whether it also includes intrinsic fraud. One side of this issue was stated in Green v. Ancora-Citronelle Corporation, 577 F.2d 1380, 1384 (1978):

> [A] judgment may be set aside only where the fraud is extrinsic or collateral to the matters involved in the action. (Citations omitted). In order to be considered extrinsic fraud, the alleged fraud must be such that it prevents a party from having an opportunity to present his claim or defense in court, (citations omitted), or deprives a party of his right to a "day in court." (Citations omitted).

The debate has evolved and the importance of the extrinsic/intrinsic distinction appears to have lessened:

> Rule 60(b) does not limit the power of a court to entertain an independent action to set aside a judgment for fraud upon the court. This court recently approved the following definition of fraud upon the court proposed by Professor Moore:
>
> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself,[3] or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. (Citations omitted). Thus

---

[3] No allegation has been made that any party even attempted to taint a judicial officer, member of the jury, or other person so as to result in corruption of the court. For the remainder of this opinion, therefore, unless specifically otherwise stated, reference to the saving clause of Rule 60(b) shall include fraud upon the court other than a taint or corruption of the court.

fraud upon the court includes both attempts to subvert the integrity of the court and fraud by an officer of the court.

* * *

Extrinsic fraud occurs "where a party is prevented by trick, artifice or other fraudulent conduct from fairly presenting his claims or defenses or introducing relevant and material evidence . . . Perjury, on the other hand has been characterized as intrinsic fraud . . . .

The distinction between extrinsic and intrinsic fraud has been criticized by commentators, (citations omitted) and the distinction generally does not apply to fraud upon the court, but only to fraud by the parties.

* * *

[T]he inquiry as to whether a judgment should be set aside for fraud upon the court under Rule 60(b) focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity of the judicial process:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

> Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. [Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944), *overruled on other grounds*, Standard Oil of Cal. v. United States, 429 U.S. 17, 18 (1976)]; *See also* Alexander v. Robertson, 882 f.2d at 424 (9th Cir. 1989).

In re Intermagnetics America, Inc., 926 F.2d 912, 916-17 (9th Cir. 1991).

Moore's Federal Practice, suggests that 60(b) fraud upon the court can take either of two forms. Either it involves an attempt to corrupt the court or it is a fraud upon the court committed by an officer of the court. *See* 7 Moore Federal Practice (2d ed.) § 60.33 at p. 60-360. This distinction is based on Moore's interpretation of the Supreme Court's analysis in the Hazel-Atlas case, *supra*, and the Supreme Court's holding in United States v. Throckmorton, 98 U.S. 61 (1878).

It would appear to be Moore's interpretation of Throckmorton that wrongful conduct by a party, as opposed to the party's attorney, which does not affect the impartiality of the court does not reach the level of fraud upon the court. In Throckmorton, the questionable conduct at issue was perpetrated by a party and not by an officer of the court. Throckmorton involved fraud in a land claim. The land claim was based on an invalid, back-dated land grant or concession of land. The concession of land was

not contained in the records of the surveyor-general although all other records were in proper order with the surveyor-general. This is the office where such a record would be found if the land grant document was authentic. Despite the original absence of this document and the document's later production by the land claimant, no contemporaneous investigation to determine the authenticity of the document was undertaken. This is so even though the questionable nature of the grant document surfaced in the first year of a five year litigation.

The Throckmorton Court held that the government's failure to investigate the indicia of fraud during the original proceeding; the fact that the government failed to explain how, during the intervening twenty years, the original fraud was discovered; how, after such a long time, the fraud was to be proved; and the fact that the action to set aside the judgment in the original action had not been officially sanctioned by the Attorney General for the United States, taken together, required that the original action stand and that the independent attack be dismissed. Nowhere in the opinion did the Court assign any weight to the fact that the alleged fraud in the original action did not involve the actions of an officer of the court.

In Hazel-Atlas Glass Co. v. Hartford-Empire Co., *supra,* a patent was secured on a "gob-feeding" glass manufacturing machine by Hartford-Empire. This patent was secured, in part, as a result of an article which appeared in a trade journal at the time. This article was authored by an attorney for Hartford; however, the article was signed by and attributed to the president of a glass workers' union. This article was not prepared for the purposes of trial, but for the purpose of securing the patent on the machine.

The Hazel-Atlas case was a patent infringement case wherein Hartford-Empire alleged Hazel-Atlas infringed

Hartford-Empire's patent. The article played no part at the trial of the issue where Hazel-Atlas prevailed. On appeal, however, Hartford Empire cited the article and the appellate court made numerous citations to it and quoted several portions of it in the opinion which reversed the district court. Hazel-Atlas was informed of the spurious authorship of the article at the time of the original trial, but did nothing because the article was of no import at that time. It was only on appeal that the article took on any magnitude. It was this "deliberately planned and carefully executed scheme to defraud the [court]" which was offensive and warranted the equitable relief afforded. Hazel-Atlas, 322 U.S. at 245.

In its recitation of the history of the equitable relief from judgments the Court noted that justice will not be a slave to formality:

> Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. Bronson v. Schulten, 104 U.S. 410, 26 L.Ed. 797. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of

> their entry. Marine Insurance Company v. Hodgson, 7 Cranch 332, 3 L.Ed. 362; Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. But where the occasion has demanded, where enforcement of the judgment is "manifestly unconscionable", Pickford v. Talbott, 225 U.S. 651, 657, 32 S.Ct. 687, 689, 56 L.Ed. 1240, they have wielded the power without hesitation. (Footnote omitted).

Hazel-Atlas, *supra*, 322 U.S. at 244-45.

Moore notes the factual similarity between Throckmorton and Hazel-Atlas and the fact that opposite results were reached by the Supreme Court. (7 Moore Federal Practice (2d ed.) § 60.33 at 60-357 through 60-359). The major distinction between Throckmorton and Hazel-Atlas, according to Moore, is the involvement of an attorney in the Hazel-Atlas fraud and the lack of an attorney in the Throckmorton fraud. Moore concludes this distinguishes the two cases and supports the contrasting results.

This court is of the opinion that the distinction created by Moore, that a Rule 60(b) saving clause fraud upon the court must involve an officer of the court, is an artificial distinction that is not borne out in either the case law cited by Moore or in the rule itself. Indeed, cases analyzing fraud upon the court focus more upon the allegedly fraudulent activity than upon the actors.

The Throckmorton court suggests the following as appropriate instances for relief from judgment under fraud upon the court analyses:

> where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced upon him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, -- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citations omitted).

98 U.S. at 65-66.

The above language from Throckmorton was quoted in Luttrell v. United States, 644 F.2d 1274, 1276 (9th Cir. 1981). Following the quotation from Throckmorton, the Luttrell court stated: "[t]he concern of the court in Throckmorton and its progeny was that because of this type of fraud, the injured party is prevented from fairly presenting his claim or defenses or from introducing relevant or material evidence." (Citations omitted). The Ninth Circuit embraced this language again in Abatti v. Commissioner of Internal Revenue, 859 F.2d 115, 118 (9th Cir. 1988), when it cited Luttrell with approval.

In Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989), the court, in its analysis of an action under the saving clause of 60(b), stated that a saving clause action is "clearly not limited to fraud committed by an adverse party" and cited a case in which the fraud was committed by both an attorney and the complainant's husband who was not an attorney.

No distinction between fraud by an officer of the court as opposed to fraud by a party is raised in these cases.

Moore's analysis can be summarized as follows: there was a similar degree of fraud in both cases; one justified relief and the other did not; one involved an attorney and the other did not; the presence of the attorney tipped the scales in favor of the requested relief.

As was noted by the Ninth Circuit, Moore's simplistic approach offers little comfort or guidance when wrestling with these complex issues:

> [w]hat is meant by "fraud perpetrated by officers of the court?" Does this include attorneys? Does it include the case in which an attorney is deceived by his client, and is thus led to deceive the court? The most we can get out of Moore's definition is that the

> phrase "fraud on the court" should be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest.

Toscano v. Commissioner of Internal Revenue, 441 F.2d 930, 933-34 (9th Cir. 1971). To this list of questions the court would inquire of the result in a case involving fraud upon the court by a *pro se* litigant. Would Moore hold the court powerless to act unless the adversary sought relief within the one-year period provided in 60(b)(3) regardless of the degree of fraud upon the court and regardless of the actor's affect on the judicial machinery? This court would also point out that the fraud in Toscano did not involve allegations that an attorney was a knowing participant in the scheme, only that the attorney signed a stipulation for an alleged husband and wife who were not actually husband and wife. The fraud was perpetrated by the husband, not the attorney. 441 F.2d at 931-36. The lack of an allegation of active fraud upon the court by Toscano's attorney did not prevent the Ninth Circuit panel from setting aside the previous judgment and ordering a determination on the merits.

Moore's requirement that the fraud upon the court involve an officer of the court unnecessarily constrains the court in its consideration of prior fraud, and sanctions even "manifestly unconscionable" conduct by a party, so long as that party keeps the truth of that "manifestly unconscionable" conduct from that party's lawyer. The *raison d'etre* of the saving clause is to provide courts with a conduit to final judgments so that manifest injustices may be corrected. It defies reason to give the courts the power to correct these wrongs but then limit this power to those cases where the wrongs were perpetrated or at least sanctioned by an officer of the court.

The nature of the relief requested in this type of motion and the history behind this relief was discussed in Hazel-Atlas:

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.

322 U.S. at 248.

Historically, a balancing test has been undertaken in which interest in the truth and the search for justice have been placed on one side and the need for an end to litigation at some rationale point has been placed on the other. Rule 60(b)(1)-(6) is intended to aid the search for truth and justice and, at the same time, give direction with regard to finality. In most cases, after a certain point, the quest for the truth takes a back seat to finality and once this point is reached, a litigant is barred from pressing the matter. Even this rule is not absolute, however, and certain, very-narrow exceptions are allowed. Among these exceptions is one carved in the case of fraud upon the court found in Rule 60(b).

Rule 60(b) has two provisions regarding fraud: 60(b)(3)[4] and the saving clause. 60(b)(3) fraud actions must be filed within one year of the judgment or they are forever lost. If the fraud is not discovered before the one-year statute of limitations, the fraudulent actor escapes without consequence. A certain amount of wrongful conduct is tolerated and a certain amount of justice is sacrificed in the name of finality. This leads one to conclude that a saving clause fraud action must be different than the type of fraud considered in 60(b)(3).

This is where the distinction between a lay actor and fraud by an officer of the court cited by Moore can come into play. Officers of the court receive training in the rules of conduct. They are schooled in the rationale behind, and the policy supporting those rules. Officers of the court understand the necessity for honesty in the conduct of the court. The court, the litigants, and other counsel are dependent upon officers of the court to abide by the rules and conduct themselves and their proceedings in a forthright and honorable manner. When an officer of the court fails to comport him or herself in the manner required by the rules of conduct, the system fails. Confidence in a system designed to ferret out the truth will fail should those who control the day-to-day operation of the system break the rules. Officers of the court are aware of the fragile nature of the system and are charged with its protection and preservation. When an officer of the court loses sight of his or her charge and acts in a manner inconsistent with the rules, any gain wrought from that wrongful conduct cannot be allowed to stand.

---

[4] Rule 60(b)(3) allows post-trial relief on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . ."

The doctrine of honoring the finality of judgments cannot force courts to ignore "manifestly unconscionable" conduct. A party must not be rewarded for scheming to keep the truth from the fact finder. A party must not be allowed to insulate itself from the consequences of wrongful conduct simply by keeping this wrongful conduct from its advocate. The court must be able to police those who appear before it and scheme to break court rules in order to gain advantage. The court must be free to award relief to right fraudulent conduct and must not be constrained by technical interpretations of who it has authority to punish and who it does not. Litigants must not be allowed to escape the reach of the rules simply by keeping wrongful conduct from the ken of its counsel.

Law has its voice in Rule 60(b)(3).

Equity has its voice in the saving clause of Rule 60(b).[5] The traditional equitable remedies can be reached through this saving clause conduit.

It is hornbook law that resort to equity may be had only when adequate relief can not be found at law. This is one reason equitable relief is often referred to as extraordinary relief.

In theory, the rules of law are static. They are intended to be algebraic formulae wherein factors are inserted and reasonably predictable results are achieved.

The principles of equity, on the other hand, are intended to be fluid. In equity, the particular nature of the factors take the situation out of the operation of the law formula.

---

[5] The drafters of the Federal Rules of Civil Procedure recognized the history of equity, recited in the Hazel-Atlas quotations, *supra*, when they included the saving clause in the 1946 amendment to Rule 60(b).

And, while equity is intended to address those circumstances that cannot be satisfactorily addressed at law, equity must follow the law.

In the Rule 60(b) scenario, application of the equity must follow the law maxim is simple: if relief should have, or could have, been afforded during the one year period of 60(b)(3), if the nature of the 60(b) claim is such that it does not reach the level of an extraordinary claim, resort to the saving clause will not be allowed.

With the above in mind, analysis of a potential saving clause action is not a complicated process: first, was there a fraud upon the court; second, was relief available under 60(b)(3), i.e., could the existence of the wrongful conduct, with the exercise of reasonable diligence, have been discovered within that year; and third, was the fraud upon the court extraordinary or "manifestly unconscionable?"

The court believes the construction of the saving clause of Rule 60(b) advanced by Moore is too narrow. His search for a hard and fast rule and application of a static legal concept are at odds with the most fundamental notion of equity and equitable proceedings. The court believes, as did the Toscano Ninth Circuit panel, that the involvement of an officer of the court in an alleged 60(b) saving clause fraud upon the court is not an absolute prerequisite to the maintenance of an action to set aside a prior judgment under the saving clause. Nevertheless, it appears the majority of courts considering this issue have required the involvement of an officer of the court. This would appear to be the position in the Ninth Circuit based on recent decisions, although Toscano has never been directly overruled. Submitting to the sheer volume of decisions accepting the position of Moore on this issue, the court will undertake to determine if any fraud upon the court was perpetrated with the aid of an officer of the court.

IS MR. BARTLETT AN "OFFICER OF THE COURT"

In order to complete the analysis embarked upon above- and in order to address the plaintiffs' motion for partial summary judgment, the court must now determine whether, as a matter of law, Mr. Bartlett is an officer of this court.

Mr. Bartlett is a lawyer admitted to the bar of the Commonwealth of Massachusetts. (Affidavit of Edward Bartlett dated August 9, 1991). His involvement in Sparks I was as General counsel [sic] for the defendant (id.) and as vice president of the defendant. (Affidavit of Edward Bartlett dated January 18, 1991). He was actively involved in the discovery phase of Sparks I following his hiring by the defendant in April of 1982. Mr. Bartlett gathered information in response to interrogatory questions and framed the answers. (October 11, 1991, Bartlett Depo. Excerpt pp. 67 and 74-77 attached as Exhibit D to Affidavit of Jeffrey Strother dated April 1, 1992). He was active in investigation and preparation of evidence which was introduced during Sparks I. During the pre-trial period at least three videotaped tests involving the Contender were conducted. Present during the taping of these tests were Mr. Bartlett, Mr. French, and Mr. Gustafson. These three videotapes were all introduced into evidence and played for the jury in Sparks I. (Sparks I Trial Transcript p. 956 at lines 13-19; p. 919 line 3 through p. 920 line 22; Defendant's Exhibit 103 admitted: p. 851 lines 23-24, played for the jury: p. 852 line 1 through p. 857 line 21; Defendant's Exhibit 105 admitted: p. 870, lines 5-7, played for the jury: p.870 line 13 through p. 873 line 18; Defendant's Exhibit 104 [the July 30, 1982 videotape] admitted: p. 875 lines 17-19, played for the jury: p. 875 line 20 through p. 882 line 15).

Bartlett was present during the July 30, 1982,[6] videotaped drop test of the Contender. (Defendant's March 11, 1992, Statement of Material facts [sic], p.4).[7] Bartlett was aware that the contender [sic] had fired previously during a similar test conducted by French in French's office. (Defendant's March 11, 1992, Memo. Sup. Sum. J., Exhibit A, p. 4, lines 17-22). The issue of the plaintiffs' use of this video was discussed by the three participants in the drop test, Mr. Gustafson, the president, Mr. French, the production manager, and Mr. Bartlett following the accidental firing of the Contender when it was dropped butt-first onto a rock from a height of three feet:

Mr. Bartlett: "You should reset it every time."

Mr. French: "Will they make an issue out of that?"

---

6 The memorandum indicates the videotape recording was made on July 28, 1982; however, the Sparks I Trial Transcript at page 875, line 23 through page 876, line 2; the transcript of the videotape at page 1, line 2, attached as Exhibit A to the defendant's Memo. Sup. Sum. J. filed March 11, 1992; and the videotape itself, attached as exhibit [sic] P to Strother's April 1, 1992 affidavit, indicate the drop tests in question were videotaped on July 30, 1982.

7 The court notes that item 20 of this statement of facts states: "In the first portion of the demonstration French disengaged the internal safety and engaged the external safety. (Bartlett Deposition Exhibit 2)".

In the defendant's memorandum supporting summary judgment filed the same day as the statement of facts, March 11, 1992, at page 8, defendants state: "As part of the demonstration French intentionally disengaged the external safety and dropped the firearm, relying only on the internal or automatic safety."

Mr. Gustafson: "Yeah, well you don't have to dwell on it Ken. You don't have to dwell on it Ken -- You don't have to say . . ."

Mr. French: "I know, but they are going to see that. Will their people make an issue . . ."

Mr. Bartlett: ". . . say, 'I'm going to reset it, I'm going to cock it to . . ."

Mr. Gustafson: "OK, I'll tell you what we will do. Have we got enough live ammo?"

Mr. French: "Oh yeah."

Mr. Gustafson: "We will make it look like a smooth. You do it once you fire it. You set it. You put another one in."

Mr. French: "If I fire it each time, it will like . . ."

Mr. Gustafson: "It'll look like that . . ."

Mr. French: ". . . it, it won't be so easy to pick up that I am resetting it."

Mr. Gustafson: "Right, right."

Mr. Bartlett: ". . . way to do it. Need any more ammunition?"

(Id. Exhibit A at page 4, line 30 through page 5, line 7).

Mr. Gustafson, Mr. Bartlett, and Mr. French discussed the cause of the accidental firing. After consideration, they determined the Contender fired because the internal safety had accidentally come off during the drop. (Id. Exhibit A at page 3, line 38 through page 4, line 30). They also determined that the internal safety had to be manually reset during the second videotape so that the internal safety would not allow a second accidental firing. (Id.).

Bartlett retained possession of the original July 30, 1982, videotape after the tape was made. (October 11, 1991,

Bartlett Depo. Excerpt at page 80 lines 1-13, attached as Exhibit D to Strother's April 1, 1992 affidavit).

A second videotape, wherein the gun did not fire when dropped, was also made on July 30, 1982. It was this second videotape which was shown to the jury during Sparks I. (Defendant's Memo. Sup. Sum. J. p. 9).

Bartlett retained possession of the second July 30, 1982, videotape after the tape was made. (October 11, 1991, Bartlett Depo. Excerpt at page 80 lines 1-13, attached as Exhibit D to Strother's April 1, 1992 affidavit).

The defendant has explained Bartlett's pre-trial involvement as follows:

"It was decided by Thompson that a demonstration of the Contender using the SAAMI [Sporting Arms and Ammunition Manufacturers Institute] protocol should be performed and videotaped so that attorneys defending product liability actions involving the Thompson Contender single shot pistol would have some knowledge of the workings of that firearm." (Defendant's Memo. Sup. Sum. J. dated March 11, 1992, at p. 7 citing Gustafson Deposition at 17 and Bartlett Deposition at 88-91). "It was not intended that the video tape would be shown at trial or to opposing counsel." (Id. citing Gustafson Depo. at 18-20; French Depo. at 34, 42; Bartlett depo. [sic] at 36, 46, 90). "Instead, it was intended merely as a demonstration of how the Thompson Contender withstood abusive dropping for the benefit of defense counsel employed by Thompson to defend it in-product liability actions." (Id. citing French Deposition at 39).

On August 31, 1981, prior to Mr. Bartlett's employment as general counsel for the defendant, the defendant answered the plaintiffs' first requests for production of documents. Request for production number four requested "[a]ll records relating to testing of the Thompson Contender

handgun for safety and for the safety and integrity of the safety mechanism of the Thompson Contender handgun." The defendant responded: "[t]his defendant is not presently aware of any records relating to the testing of Thompson Contender handguns. If records are later, discovered they will be made available pursuant to this request." (Exhibit B to Affidavit of Anthony Park filed June 30, 1992). (Emphasis added). Despite Mr. Bartlett's involvement in the July 30, 1982, videotaped drop tests, and his involvement in coordinating and drafting discovery responses, he did not update Request for Production Number 4. This request for production was not updated by anyone. (Affidavit of Anthony Park filed June 30, 1992).

On August 26, 1982, a month after the videotaped drop tests, the defendant answered plaintiffs' interrogatories. Interrogatory number ten asked "[i]s Defendant Thompson aware of any incidents or occurrences where a Thompson Contender pistol has discharged upon being dropped, including any events occurring during tests or investigation, any accidents known to Defendant Thompson and/or any reports of accidents?" The defendant answered "Yes."

Interrogatory number 11 sought:

"(a) A detailed description of each such incident or occurrance (sic);

(b) The date of each;

(d) A description of all documents containing information about each such occurrence or incident including the date of such document the general subject matter contained in such document and the name and address of the person presently having custody of each such document."

The defendant, after providing employment information of the witnesses, responded:

In July 1982, Ken French intentionally disengaged the internal and external safety mechanisms on a Contender and dropped the gun from a height of approximately five feet so that the hammer struck a rock approximately 14" by 10" in length and width. The Contender discharged. The occurrence was observed by Robert Gustafson and Edward H. Bartlett. Their addresses are found elsewhere in these answers to Interrogatories. There is no documentation of the occurrence.

Interrogatory number 19 asked:

[h]as Ken French conducted any investigation, tests, examinations, or other analysis of Thompson Contender Pistols for any reason since his deposition was taken in the above entitled action on April 22, 1982? If so, with respect to each test, examination, investigation, or analysis, please state:

(a) The date of each;

(b) A description of the action and/or procedure taken on each occasion;

(c) The purpose or reason for each such test, examination, investigation and/or analysis;

(d) The findings and conclusions reached as a result of each and whether or not written reports thereof have been made;

(e) The names and current addresses of all persons participating

with said David Findlay [sic] in each; and

(f) The name and current address of each person who has received the findings and/or results of each.

ANSWER:

(a) Various (May-August 1982)

(b) Dropping and striking with a mallet;

(c) To determine if Contenders will discharge if dropped or if struck with a mallet;

(d) Contender will not go off if dropped or if struck with a mallet with safety on;

(e) Unknown;

(f) Legal Counsel for defendant Thompson.

(Answers to Interrogatories dated August 26, 1982, attached as exhibit [sic] B to Defendant's March 11, 1993, Memo and as an exhibit to Mr. Bartlett's affidavit filed on January 18, 1992). (Emphasis added).

Mr. Bartlett admitted he drafted the answers to these interrogatories. (October 11, 1991, Bartlett Depo. Excerpt pp. 67 and 74-77 attached as Exhibit D to Affidavit of Jeffrey Strother dated April 1, 1992).

No one at the defendant differentiated between Mr. Bartlett's activities as vice president and his activities as general counsel.

Mr. Bartlett sat through the entire trial of Sparks I and he was present throughout the testimony of Ken French.

(Sparks I Trial Transcript p. 56, lines 4-7; Sparks I Trial Transcript p. 899, line 25 through p. 890, line 19; Defendant's Statement of Material Facts dated March 11, 1992, ¶¶ 44-46; October 4, 1991, Ken French Depo. Excerpt page 57 line 22 through page 58 line 1).

Finally, following Sparks I, in Moore v. K.W. Thompson Tool Co. Inc., Civil No. 83-4132 (D. Idaho 1983), a subsequent suit involving the defendant in this court, in interrogatory number 3, subpart 8, Mr. Bartlett was asked to state the general nature of the information he had regarding prior lawsuits resulting from accidents involving the Contender. In the answer to this interrogatory, signed by Mr. Bartlett, he stated: "Information is protected by the attorney/client privilege." When, in that same interrogatory, he was asked to describe documents he prepared, he again stated: "Documents, if any, are protected by attorney/client privilege." (June 29, 1984 Answers by defendant to Moore's second set of interrogatories attached as Exhibit B to Strother's April 1, 1992, affidavit).

The plaintiffs offer E.F. Hutton & Company v. Brown, 305 F.Supp 371 (S.D. Tex. 1969) as authority for the proposition that this court may exercise jurisdiction[8] over

---

[8] The court's jurisdiction over Mr. Bartlett as vice president and general counsel of Thompson is not disputed and is not at issue. Issues of jurisdiction over Hutton's general counsel arose because Hutton's general counsel was not "in house" counsel, not an officer, director, or employee of the corporation, and not otherwise independently subject to the court's jurisdiction. It is hornbook corporation law that a corporation can act only through its officers, directors, employees, and agents. Jurisdiction over the corporation provides jurisdiction over the corporation's officers, directors, employees, and agents. The court's

[Footnote continued on next page]

Mr. Bartlett and treat him as an officer of this court despite the fact he has not formally appeared in either Sparks I or Sparks II and has not been formally admitted to practice in the state or federal courts of Idaho.

In Hutton, defendant Brown was a vice president with E.F. Hutton. After a loan went bad, Brown was fired. Hutton was represented by a Houston law firm in the Texas case. Hutton's general counsel was a New York law firm. The New York firm did not appear in the Texas litigation nor did it's name appear in an "of counsel" capacity on any pleading filed in the Texas case. However, the New York firm did participate in the investigation and prosecution of the case: accompanied Brown to SEC and bankruptcy hearings before Brown was fired; it received copies of papers served on the Houston firm; participated in investigations of transactions which are the subject matter of this action; and been available to consult with Hutton and Hutton's Houston counsel. The court held this participation was sufficient to give the Texas court jurisdiction over the New York firm:

> the Court finds that the [New York] firm's participation in the prosecution of this lawsuit is sufficient to constitute the practice of law before this Court . . . . Their failure to enter a formal appearance as required . . . does not suspend this Court's disciplinary

---

[Footnote continued from previous page]

jurisdiction over Thompson has not been attacked and Thompson has voluntarily submitted to that jurisdiction through its appearance in this action. This jurisdiction is limited to their roles as officers, directors, employees, and agents of Thompson.

> power over them. They have submitted to this Court's jurisdiction.

Id. 305 F.Supp at 381.

In this case, Mr. Bartlett has admitted he is general counsel for the defendant and a licensed attorney admitted to practice in the Commonwealth of Massachusetts. He has denied admission to practice before any court of this state or even in the 9th Circuit. He participated in the investigation and testing of the Contender in anticipation of the trial of Sparks I. One of these investigations and tests resulted in the Contender's discharge. He participated in the preparation of evidence introduced during the trial of Sparks I and shown to the Sparks I jury. He was involved in the creation of three videotapes which were introduced into evidence. He oversaw the gathering of information and drafted responses to discovery requests. From these facts, the court concludes Mr. Bartlett played a major role in the trial preparation of the defendant. He sat through the entire trial of Sparks I. He contends he did not participate as an attorney in the trial of Sparks I. (August 9, 1991, Affidavit of Bartlett at page 2; January 18, 1991, Affidavit of Bartlett at page 2). Yet, in a later proceeding in this court (Moore v. K.W. Thompson Tool Co., Inc., Civil No. 83-4132), he claimed the attorney/client privilege regarding Sparks I. This indicates a level of participation far in excess of the level of participation of the New York counsel found in Hutton and is inconsistent with his claim that he should be treated as any other lay employee of a corporation.

This court agrees with the position taken by the Second Circuit. In NCK Organization, Ltd. v. Bregman, 542 F.2d 128, 133 (1976), a corporation's previous house counsel/vice president asserted that he should not be considered the corporation's attorney because he functioned in an administerial capacity where his duties required other

than legal skills. The court responded that: "[a]lthough official house counsel here occupied the positions of [plaintiff's] vice president and director, at least where circumstances indicate that his participation consisted of more than action simply in an officer's capacity, house counsel may not avoid the canons by claim of officerial action only." The Second Circuit's position was based, at least in part, on the following Ninth Circuit quotation:

> It does not make any difference that the particular transaction is one which could have been handled on the client's behalf by a layman. . . . Lawyers customarily render both legal and nonlegal services, without distinction. . . [C]lients . . . are entitled to expect that their lawyers will act as they are supposed to act, without quibble as to what particular services may have been technically legal services.

Id. *quoting* Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964).

Mr. Bartlett has drawn the distinction that his failure to make a formal appearance in Sparks I insulates him from the court's reach for purposes of classification as an officer of this court. His position is that his failure to enter this formal appearance prohibits such a finding. He has argued that his presence during the trial of Sparks I was in his role as a vice president of Thompson. He has argued if Mr. Gustafson, the president of Thompson, had attended the trial in place of Mr. Bartlett, this court would be precluded from finding that Mr. Bartlett is an officer of this court.

Mr. Gustafson did not attend Sparks I as the representative of the defendant. Mr. Bartlett, general counsel for the defendant did attend the trial of Sparks I. Mr. Bartlett is a licensed attorney. No one at Thompson

differentiated between Mr. Bartlett's role as general counsel and his role as corporate vice president. This is consistent with the quotation from Cord v. Smith, *supra* that to attempt to differentiate between legal and non-legal services is to quibble. This is a hyper-technical interpretation that defies common sense and advances form over substance. This interpretation has been rejected by the courts cited above and is rejected here. The court's determination of Mr. Bartlett's role in Sparks I will not be controlled by the label attached by the defendant.

In addition to the fact that the defendant's position defies common sense, the position advanced by the defendant is contrary to the undisputed facts enumerated above. Mr. Bartlett's involvement in Sparks from April, 1982, through the trial of Sparks I was as a lawyer. He performed a variety of legal services directly related to the trial of Sparks I before this court. He was involved in the creation of evidence admitted by the court and shown to the jury. The creation of this evidence indicates involvement in the plotting of trial strategy by Mr. Bartlett. The particular manner in which Mr. Bartlett chose to interpret discovery requests, particularly interrogatory number 11 outlined above, indicates application of the trial strategy plotted by Mr. Bartlett. His involvement in investigation, testing, and discovery, and his presence during trial indicate his role as general counsel had a significant impact on the trial and outcome of Sparks I.

Under these circumstances the court is comfortable Mr. Bartlett should be treated as an officer of the court. Accordingly, this portion of the plaintiffs' motion for partial summary judgment is **GRANTED**.

DID FRAUD UPON THE COURT OCCUR DURING SPARKS I?

In order to facilitate a discussion of whether fraud upon the court was perpetrated by the defendant, a review of pertinent portions of the record in Sparks I is necessary. During this review, it is important to keep in mind that Mr. Bartlett was present throughout the testimony.

On direct examination of Mr. French by Mr. Jones, Mr. French was questioned regarding Defendant's Exhibit Number 104, the second video tape recorded on July 30, 1982:

> Q. In addition to the demonstration we have seen, did you do some drop tests with the Thompson Contender?
>
> A. Yes, sir, I did.
>
> Q. Did you use a gun identical to the gun -- was the safety mechanism used in this case Exhibit No. 1?
>
> A. As close as I could.
>
> Q. You had the manual safety and the internal safety?
>
> A. Yes.
>
> Q. Did you perform that demonstration or test?
>
> A. Yes, I did.
>
> Q. Was there any attempt to alter or modify that video tape or edit it?
>
> A. No, sir, there was not.
>
> Q. Does the video tape fairly and accurately portray the tests you did with the dropping of the gun?

A. Yes, it does.

(Sparks I Trial Transcript, p. 874, line 14 through p. 875, line 9).

During cross-examination by Mr. Meuleman, Mr. French volunteered, not in response to any particular question: "I have never been able to make the Thompson Contender fire in a drop." (Sparks I Trial Transcript, p. 930, line 24 through p. 931, line 1). (Emphasis added).

Later during Mr. Meuleman's cross-examination of Mr. French, the following exchange was heard:

> Q. Well, okay, let's ask it this way. We have heard testimony that the internal safety with the Thompson Contender would disengage if it is dropped. You have heard that testimony haven't you?
>
> A. Yes.
>
> Q. Will the safety on this gun disengage if you drop it?
>
> A. If it's in a cocked position, I suppose it could. I don't know.

(Sparks I Trial Transcript, p. 933, lines 1-10).

Later during this line of questioning Mr. French testified:

> Q. Then the other drop tests, you didn't check those things?
>
> A. Well, I do know one of the drops, and I believe it was one from five feet, that the internal safety was off when I was testing only the internal safety.
>
> Q. It did disengage?
>
> A. On one drop, yes, sir, it did.

Q. You didn't tell us that on the video tape.

A. Well, the test was to see if the gun would fire or not and the gun did not fire.

Q. Oh, I see. Is there anything else you didn't tell us on the video that is significant about your experiments?

A. Not that I believe is significant.

Q. If you drop a gun like that the internal safety disengages and that's a rather unsafe condition, isn't it?

A. With it laying there with the hammer on the firing pin, I would have to agree that in the case of any gun with it just laying there it is in an unsafe condition.

Q. Essentially what you show in your tests, if you drop the Thompson Contender on the butt and the internal safety disengages the gun is unsafe if the hammer falls down to the firing pin?

A. Well, if you drop any gun, the first think [sic] you do is open it up, yes, sir.

Q. If in your drop test with the gun when you dropped it on the butt, and the internal safety disengaged, if the gun hammer dented the rock, would you expect to find that primer indented?

A. It would depend upon the force applied to the hammer after the safety was disengaged.

Q. Can we tell -- at least I couldn't see, but could you tell whether or not in any of

your drop tests that it resulted in the course of events where the butt hit the rock and the hammer hit the rock? Do you know whether that happened in your tests?

A. I don't know that for sure.

Q. You really weren't testing for that were you?

A. I was testing to drop the gun to see if I could make it fire.

Q. If you dropped that gun a hundred times like that would you feel secure that it would not fire?

A. I feel very sure that it would not fire. I haven't been able to make it fire.

Q. Have you done more tests than what we have seen here?

A. Yes, I have dropped the gun before to see if it would fire, yes.

Q. And you have never been able to make this happen?

A. I never had it fire during the drop, no.

(Sparks I Trial Transcript at page 941, line 3 through page 943, line 10). (Emphasis added).

In cross-examination by Mr. Howard, Mr French was asked:

Q. In the tests that you filmed, the gun never went off, did it?

A. No it didn't, only when I intended for it to.

Q. When was that?

A. Only when I fired the gun.

Q. But when you dropped the gun it never went off in the testing you did so you concluded didn't you that that gun just doesn't go off when it is dropped?

A. That is my opinion, yes.

Q. You were here when your two experts testified that it will go off, weren't you?

A. I heard no testimony that this gun will fire when dropped.

Q. Well, did you hear both Mr. Block and Mr. Crossman testify that the internal safety would become disengaged when dropped on the butt then if the gun went onto the hammer it could fire?

A. Yes, that's the testimony I heard that it could fire. But I have never seen any case that this has happened. But I have heard of cases of it happening.

Q. Did you discuss those cases that had happened other than in this lawsuit?

A. I know of two other cases of alleged drops other than this lawsuit, yes.

Q. However, you have not been convinced that that happened?

A. I have never seen anybody make one of these guns fire when dropped.

Q. When you did these tests did you do any other tests that you did not happen to film?

A. I have done other tests on film and I have done other tests that were not on film, of course, over the years.

Q. But, in this procedure when you were doing these films did you do any tests other than the ones filmed?

A. Concerning what we did on the film?

Q. Have you done any other tests where the gun was dropped or the hammer was placed against the gun, or any other tests done -- that were done -- at about the same time that these tests were done where you did not take films on them?

A. No, there was none.

Q. You filmed everything you did in regard to these tests?

A. On that particular day, yes. I ran other tests on other days that I did not film. Of course I have.

(Sparks I Trial Transcript at page 957, line 1 through page 959, line 1). (Emphasis added).

On re-cross-examination by Mr. Meuleman, Mr French testified as follows:

Q. I think you said, Mr. French, that you had never heard of a Thompson Contender discharging when it was dropped. Is that what you said?

A. Yes, that's what I said.

Q. Well, when I asked the question about other accidents involving drops, you told me that you heard three times that the gun had been dropped and it discharged.

A. I said I heard of alleged times that the gun had been dropped.

Q. Well, nobody has ever been able to prove that these accidents really happened to your satisfaction?

A. No one ever proved that the gun would fire when dropped, no sir.

Q. But you have heard of at least three other accidents where people said they dropped the gun and it shot.

A. Three in all counting this one, yes. I have heard that said.

(Sparks I Trial Transcript at page 967, lines 3-22). (Emphasis added).

The test conducted by Mr. French in the presence of Mr. Bartlett wherein the Contender discharged when dropped on its butt occurred on July 30, 1982. According to statements made on the July 30, 1982, video, the same thing had happened previously when Mr. French dropped the gun on its butt in his office. This statement was made in the presence of Mr. Bartlett. The trial of Sparks I commenced on September 23, 1982. French and Bartlett were aware that the gun fired when dropped on its butt on July 30, 1982, and that this incident had been videotaped. During his testimony, Mr. French told sixteen outright lies regarding his knowledge of a Contender firing when dropped on its butt and the videotaping of drop tests.

The allegations of wrongdoing are as follows:

A video tape was made wherein a Contender fired when dropped from a height of three feet. The existence of this video tape was denied; the firing of a Contender during this test was denied; the setting of the safeties was lied about.

The issue in the lawsuit was whether the Contender fired due to a defect in the gun when it was dropped on its butt. In a simulation of this scenario performed by Ken French in his office, the gun discharged. Later, during pre-trial preparation, the defendant conducted a series of videotaped drop-tests of the Contender. Mr. French conducted the tests, and they were observed by Mr. Bartlett. One particular drop test in the series was made from a height of three feet, after thorough visual inspection, and without any disengagement of the internal safety. The attitude of the gun when it hit the rock was butt first with-the barrel pointing up. This is the attitude of the decedent's Contender at the time of the fatal accident and the attitude of the Contender dropped in Mr. French's office. During this particular drop test, the gun discharged.

In discovery, and in response to a question as to whether the defendants were aware of any test episodes where the Contender accidentally fired, Mr. Bartlett, speaking on behalf of the defendant, responded that in one test where the gun was dropped from a height of <u>five</u> not three feet, after the internal safety had been <u>intentionally</u> disengaged, the gun discharged. The existence of the original video was denied in this inaccurate interrogatory answer prepared by Mr. Bartlett and was never updated. No mention of the test in Mr. French's office was offered. The plaintiffs were not put on notice of the existence of this test.

During trial, with Mr. Bartlett present in the courtroom, evidence which bears up the deceptive postures taken in the interrogatory answer was presented to the jury. The defendant presented a videotape simulating drops similar to the allegedly fatal drop. During these tests the gun did not

fire. The testimony of Mr. French buttressed the deception. All of this was done in the presence and with the knowledge of Mr. Bartlett.

Evidence which the factfinder had a right to assess was intentionally kept from the factfinder. Consistent with their deceptive scheme, contrary and inaccurate evidence was presented. This evidence supported a position which was known by Mr. Bartlett and other representatives of defendant to be false. This was carried out through a deceptive scheme that was consistently held to by the defendant.

It could be argued, and in fact the defendant has argued, that the sixteen separate instances of perjury by Mr. French during the trial of Sparks I; the failure to provide the original video as the defendant promised it would in its answer to request for production number four prior to trial; the introduction into evidence at Sparks I of the substitute second video; and the posture assumed in the defendant's answers to interrogatories 11 and 19 might constitute 60(b)(3) fraud upon the plaintiffs, but these acts, taken separately or as a whole, do not amount to a saving clause fraud upon the court sufficient to justify setting aside the jury's verdict in Sparks I. The argument has been advanced that this is intrinsic fraud which should have been cured within the year of its perpetration.

This court disagrees. What we have is a careful, consistent, complicated, thorough, and long-lasting scheme not only to keep evidence from the plaintiffs, but to keep evidence from the fact-finder in Sparks I; evidence which the fact-finder had a right to consider. In this case, through the direct action of the defendant and agents of the defendant, through testimony which at best failed to accurately portray what the defendant's agents knew to be true, and at worst was perjury, and through the failure to produce what was required to be produced the defendant

denied the jury access to facts regarding the absolute core of Sparks I. The question was whether, through the fault or negligence of the defendant, a Contender could have discharged and whether through fault or negligence of the defendant this discharge caused the death of the decedent. The defendant purposefully undermined the judicial process when it worked to keep the truth from the jury in Sparks I. In Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989), the court stated:

> A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. *See, e.g.*, Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989); Pfizer, Inc. v. International Rectifier Corp. 538 F.2d 180, 195 (8th Cir. 1976); England v. Doyle, 281 F.2d 304, 309 (9th Cir. 1960); United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F.Supp. 1172, 1186-87 (D. Kan. 1984); United States v. ITT Corp., 349 F.Supp. 22, 29 (D. Conn. 1972), *aff'd mem.*, 410 U.S. 919, 93 S.Ct. 1363, 35 L.Ed.2d 582 (1973).

The salient facts are all taken from court documents or court transcripts and are not subject to dispute. When these facts are analyzed, it is clear that what we have here is a clearly planned and executed scheme which unfairly hampered the presentation of the opposing party's claim. This scheme surpasses mere fraud upon the other party. This scheme, in both plan and application, transcends

intrinsic fraud. Accordingly, the court believes the court could conclude a fraud upon the court has been perpetrated whether Mr. Bartlett is considered an officer of the court or merely an officer of the corporation.

When this situation is analyzed with the addition of Mr. Bartlett as an officer of the court, the court believes there is no question that a fraud upon the court has been perpetrated. Mr. Bartlett is a licensed, practicing lawyer. He is aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility. He is aware of the damage failure to abide by these rules can wreck in the specific case at issue and in the larger framework of confidence in the adversary trial system.

Mr. Bartlett had an affirmative duty to come forward to correct the false impression created in the jury by Mr. French's perjury.[9] Mr. Bartlett had an affirmative duty to

---

[9] Throughout Sparks I, the conduct of attorneys was controlled by the Code of Professional Responsibility signed by Chief Justice Henry McQuade on June 25, 1971. The applicable provisions are as follows:

Canon 1: A lawyer should assist in maintaining the integrity and competence of the legal profession.

DR 1-102 Misconduct.

A. A lawyer shall not:

4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

5. Engage in conduct that is prejudicial to the administration of justice.

[Footnote continued on next page]

correct the false impression created by the original video. Mr. Bartlett had an affirmative duty to participate in discovery in a meaningful and accurate manner. Mr. Bartlett had an affirmative duty to stay free from the

---

[Footnote continued from previous page]

> 6. Engage in any other conduct that adversely reflects on his fitness to practice law.

Canon 7: A lawyer should represent a client zealously within the bounds of the law.

DR 7-102 Representing a client within the bounds of the law.

A. In his representation of a client, a lawyer shall not:

> 3. Conceal or knowingly fail to disclose that which he is required by law to reveal.
>
> 4. Knowingly use perjured testimony or false evidence.
>
> 5. Knowingly make a false statement of law or fact.
>
> 6. Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
>
> 7. Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

collusion to practice fraud upon the court. Mr. Bartlett, however, ignored these duties and chose to participate in the defendant's scheme. This scheme continued through Sparks I and after.

Mr. Bartlett's conduct after Sparks I is illuminating. He attended the August 12, 1987, deposition of Mr. French in Lane v. Thompson, in state court in St. Louis County, Minnesota involving the Contender. (Exhibit L to Strother's Affidavit dated April 1, 1992). He attended the June 20, 1989, deposition of Mr. French in Roby v. Thompson, Civil Action No. W88-0138(B) (D.S.D. Miss. 1988) involving the Contender. (Exhibits M and N to Strother's Affidavit dated April 1, 1992). The court believes these attendances at French depositions are germane for three reasons: first, they indicate that Bartlett does perform the duties of a lawyer on behalf of Thompson in Contender lawsuits; second, they show that French continued to testify in a manner known to be untruthful to both French and Bartlett; and third, they show Mr. Bartlett, acting in his role as general counsel, performing in the role of an attorney, did nothing to correct these known falsehoods. The depositions weren't interrupted and the truth was not brought out. This lends credibility to the plaintiffs' claims that Mr. Bartlett was acting as an attorney in Sparks I; attacks the credibility of the defendant's claims that he did not act as an attorney in Sparks I; and shows a common scheme or plan throughout these lawsuits, a scheme which began in Sparks I.

The defendant has raised the issue that the plaintiffs failed to diligently pursue discovery regarding the original video and the test wherein an accidental firing occurred. The defendant argues that the plaintiffs never attempted to depose Mr. French or Mr. Gustafson after they learned of the accidental discharge during testing. The plaintiffs counter this with the contention that information regarding

the accidental discharge of the Contender during the July 30, 1982, drop test was released so late (the interrogatory answers were not put in the mail to plaintiffs until August 26, 1982, less than a month before the September 23, 1982, trial date) that there was no time to follow up. (Page 20 of Exhibit to Bartlett Affidavit dated January 18, 1991). Additionally, on August 12, 1982, two weeks before the information regarding the dropped Contender had even been mailed, plaintiffs successfully pursued a motion for protective order regarding production of documents and depositions of Warren Center, Edward Bartlett, and a representative of the National Rifle Association. This protective order was sought by the defendants on August 5, 1982, a full week after the accidental firing. In the final sentence of this protective order Judge McNichols stated: "The only discovery to be completed prior to trial of this action is Defendant Thompson's Answers to Plaintiffs' Interrogatories." (Exhibit D to June 30, 1992 Affidavit of Anthony Park). Based on this clear position, it was not unreasonable for Plaintiffs to assume that a second request to depose Bartlett following this order would be unsuccessful. Additionally, the court believes the defendant was successful in its efforts to throw the plaintiffs off the scent. They stated in the pertinent interrogatory answers that before the gun discharged during the drop test, Mr. French intentionally disengaged the internal safety. Additionally, they stated there was no documentation of the event. In their failure to update request for production number four, the defendants also indicated to plaintiffs that there was no record relating to testing of the Thompson Contender handgun.

The present proceeding is an action at equity as opposed to an action at law. The equitable maxims apply in actions at equity. The most basic of these equitable maxims is that he who seeks equity must do equity. The defendant wants this court to deny the equitable relief requested by plaintiffs

on the ground that the plaintiffs slept on their rights or that they failed to act with sufficient haste. The defendant lacks the requisite clean hands to assert these equity defenses. The defendant will not be allowed to set up the situation by releasing the information in, at best, a veiled and misleading fashion, at the last minute, and then claim the plaintiffs conduct should bar their relief.

More importantly, however, this claim by defendant is unfounded. This is not a case where the plaintiffs allege they did not have an equal opportunity to investigate the properties of the Contender, the subject of the lawsuit. The defendant did not interfere with the plaintiffs' opportunity to conduct their own investigation of the Contender's propensity to discharge when dropped. In Sparks I, each party was free to conduct their own investigation and testing. This independent action is not concerned with the right of each party to conduct discovery in the prior action. This lawsuit is intended to address the defendant's intentional suppression of evidence it created; the defendant's intentional perjury; the defendant's intentional introduction of evidence designed to present a factional circumstance contrary to that which the defendant knew to exist; the defendant's intentional frustration of the rules of discovery; and the defendant's intentional fraud upon the court.

The defenses advanced by the defendant to this independent action are without merit.

Therefore, based on the discussion above, the court finds as follows:

1. As a result of the intentional scheme perpetrated by the defendant, the factfinder was duped in Sparks I;

2. This scheme constitutes fraud upon the court;

3. The court believes fraud upon the court was practiced whether Mr. Bartlett is considered an officer of the court or a lay participant;

4. The court believes the record supports the finding that Mr. Bartlett's activities in Sparks I and afterward qualify him as an officer of this court.

Accordingly, it is the court's opinion that the plaintiff's motion for summary judgment regarding the request to set aside the verdict in Sparks I and award a new trial should be, and hereby is, **GRANTED**.

THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment seeks relief directly opposite of that here afforded. The defendant's motion for summary judgment has no support in either fact or law. Accordingly, the defendant's motion for summary judgment is **DENIED**.

THE PLAINTIFFS' MOTION REGARDING AFFIRMATIVE DEFENSES

The court will now address the plaintiffs' motion for partial summary judgment regarding the defendant's six affirmative defenses.

First Affirmative Defense

In the first affirmative defense, the defendant alleges the plaintiffs' complaint is barred by the doctrine of *res judicata*. *Res judicata* is not a bar to this action. If it were, no independent action could be recognized under the saving clause found in 60(b). The issue here is whether a fraud was perpetrated on the court which precluded the full litigation of the matters in Sparks I.

Had the court found that the plaintiffs were not entitled to the relief presently requested, this independent action would have to be dismissed and the verdict in Sparks I would stand. Any attack after that determination had been reached would be barred by the doctrine of *res judicata*.

This affirmative defense is **STRICKEN**.

Second Affirmative Defense

The second affirmative defense claims the present complaint is barred by the statute of limitations. This is an affirmative defense which would have to have been raised in Sparks I. It is not raised timely here because, under the saving clause of 60(b), there is no statute of limitations. The case law is in accord. (*See*, 11 Wright & Miller Federal Practice & Procedure, Civil § 2870 at page 250 and the cases cited at note 61). This affirmative defense is **STRICKEN**.

Third Affirmative Defense

The third affirmative defense claims this action is barred by the doctrine of laches. This defense has been withdrawn.

The third affirmative defense is **STRICKEN**.

Fourth Affirmative Defense

The fourth affirmative defense is estoppel. This defense has been withdrawn.

The fourth affirmative defense is **STRICKEN**.

Fifth Affirmative Defense

The fifth affirmative defense alleges the plaintiffs waived the right to bring this action because they didn't raise the issue of the "original video" in Sparks I. This defense has been withdrawn.

The fifth affirmative defense is **STRICKEN**.

Sixth Affirmative Defense

The sixth affirmative defense alleges the plaintiffs have failed to allege the allegations with sufficient particularity so as to satisfy Rule 9(b). This was raised in the defendant's 12(b)(6) motion previously ruled on by the court. *See* Reply Memorandum filed February 14, 1991 at p.4. The court's order dated June 25, 1991, at page 8 specifically addresses this issue: "the court finds that the plaintiff's have sufficiently plead a cause of action for fraud upon the court." The defendant's request for reconsideration of this order was denied in a written order dated July 25, 1991.

The sixth affirmative defense is **STRICKEN**.

CONCLUSIONS

1. The plaintiffs' motion for partial summary judgment as to the defendant's affirmative defenses is granted. All affirmative defenses advanced by defendant are **STRICKEN**;

2. The plaintiffs' motion for partial summary judgment regarding Mr. Bartlett's status as an officer of this court is **GRANTED**. Mr. Bartlett is considered an officer of this court;

3. The plaintiffs' motion for summary judgment is **GRANTED**. The **VERDICT** in Sparks I is **SET ASIDE**, and the plaintiffs are awarded a **NEW TRIAL**; and

4. The defendant's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

Dated this 4th day of May, 1993.

/s/
EDWARD J. LODGE
UNITED STATES DISTRICT
JUDGE

FILED
AUGUST 31, 1995
CATHY A.CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN R. PUMPHREY, Plaintiff-Appellee, v. K.W. THOMPSON TOOL COMPANY, a New Hampshire Corporation d/b/a Thompson Center Arms, Defendant-Appellant.	C.A. Nos. 94-35281 94-35282 D.C. No CV-90-00514-EJL ORDER

On Appeal from the United States District Court for the District of Idaho

Before: SKOPIL, FERGUSON, and THOMPSON, Circuit Judge

The panel has voted to deny both Appellant's and Appellee's petitions for rehearing. The full court has been advised of Appellant's en banc suggestion and no judge of the court has requested a vote. Accordingly, the petitions for rehearing are denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT

FOR THE DISTRICT OF IDAHO

SUSAN R. SPARKS PUMPHREY, individually and as Guardian Ad Litem for TEDWARD O'RYAN SPARKS, and DAVID ERIK SPARKS, Plaintiffs, vs. K.W. THOMPSON TOOL COMPANY, INC., a New Hampshire corporation dba THOMPSON CENTER ARMS, Defendant.	Case CV90-0514-S-EJL JUDGMENT ON DECISION BY THE COURT

Plaintiffs' Motion for Summary Judgment came on for hearing before the Court, Honorable Edward J. Lodge, District Judge, presiding, and the issues having been duly heard and the Decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED That plaintiffs are granted judgment against the defendant as follows:

1. The verdict and judgment in Civil Case No 80-1167 are set aside; and

2. Plaintiffs are granted a new trial.

Dated at Boise, Idaho, this 7th day of March, 1994.

/s/
Edward J. Lodge
U.S. DISTRICT JUDGE

b - Judgement on decision by the court

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all of the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith

controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the

affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
JAN 31 1996
CLERK

No. 95-1054

In The

Supreme Court of the United States

October Term, 1995

K. W. THOMPSON TOOL COMPANY, INC.,
a New Hampshire Corporation
dba Thompson Center Arms,

Petitioner,

v.

SUSAN R. PUMPHREY, individually and as
Guardian Ad Litem for TEDWARD O'RYAN SPARKS
and DAVID ERIK SPARKS,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. ANTHONY PARK
PARK REDFORD THOMAS
& BURKETT
702 West Idaho Street,
Suite 310
P.O. Box 2188
Boise, Idaho 83701-2188
(208) 345-7800

JEFFREY A. STROTHER
Counsel of Record
LOJEK & STROTHER CHARTERED
305 West Fort Street
P.O. Box 1712
Boise, Idaho 83701-1712
(208) 343-7733

Attorneys for Respondent Susan R. Pumphrey

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ADDITIONAL QUESTIONS PRESENTED

1. Was summary judgment entered by the district court in this case without advance notice to the petitioner or without affording the petitioner an opportunity to oppose the summary judgment prior to its entry?

2. Did the petitioner, by its conduct before the district court, invite the district court to decide the respondents' motion for summary judgment on the issue of fraud?

TABLE OF CONTENTS

Page

ADDITIONAL QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 5

A. Considered in Context of the Entire Record, This Case Does Not Present the Question Asserted by Thompson on Page i of the Petition..... 5

B. There is no Conflict Among the Circuits on the Issue Really Presented by This Case..... 6

C. Attempting to Decide This Case Will Inevitably Involve the Court in Deciding Questions of Fact Rather Than Issues of Law..... 9

D. Viewed in Context of the Record and the Slight Differences Among the Circuit Courts of Appeal, This Case is not Worthy of Certiorari..... 11

CONCLUSION..... 12

TABLE OF AUTHORITIES

Page(s)

CASES:

American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co., 62 F.3d 574 (3rd Cir. 1995) 7

Capuano v. United States, 955 F.2d 1427 (11th Cir. 1992) 9

Chicago, Rock Island and Pacific Railway v. Callicotte, 267 F. 799 (8th Cir. 1920) 4

Jones v. Automobile Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990) 9

Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386 (7th Cir. 1981) 8

Moody v. Town of Weymouth, 805 F.2d 30 (1st Cir. 1986) 7, 8

Portsmouth Square, Inc. v. Shareholders Protective Comm., 770 F.2d 866 (9th Cir. 1985) 8

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 11

United States v. Grayson, 879 F.2d 620 (9th Cir. 1989) 9

United States v. Johnson, 260 U.S. 220 (1925) 10

United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989) 8

RULES:

Federal Rules of Civil Procedure, Rule 56 8

Rules of the Supreme Court of the United States, Rule 10 11

STATEMENT OF THE CASE

Respondents accept the petitioner's statement of the case so far as it goes. However, in view of the issue asserted by K. W. Thompson Tool Company, Inc. (henceforth called "Thompson"), in its Petition for Writ of Certiorari (henceforth called "the Petition"), it is necessary to analyze the circumstances of the summary judgment entered by the district court against Thompson to determine whether that judgment was really entered without notice to Thompson or without allowing Thompson an opportunity to be heard on the issues decided by the court.

The Complaint filed by Susan R. Pumphrey (henceforth called "Pumphrey") asked the district court to set aside the original judgment entered in 1982 on two grounds: (1) the judgment had been obtained by fraud on the court; and (2) without regard to the issue of fraud, the judgment had been obtained by means of unconscionable conduct on the part of Thompson. Prior to Pumphrey's motion for summary judgment, Thompson had never directly challenged the second of these theories, but it had challenged the claim of fraud on no fewer than four separate occasions: (1) in its motion to dismiss filed in December of 1990 (as supplemented by three further briefs filed in January, February and March of 1991); (2) a motion for reconsideration and two supporting briefs, both filed in July of 1991, (3) a motion to augment the record (filed in August of 1991 in connection with the motion for reconsideration); and (4) Thompson's own motion for summary judgment filed in March of 1992 (supplemented by a reply memorandum filed in April of

1992). In the course of these arguments, Thompson provided the district court with testimony from Edward Bartlett, Robert Gustafson and Kendrick French, the three employees involved in the fraud. Thus, contrary to Thompson's claim on page 16 of the Petition, the district court did in fact have before it the explanation by those employees of their activities and states of mind.

It is true, as stated on page 4 of the Petition, that Pumphrey originally based her motion for summary judgment upon the argument that she was entitled to relief on the grounds of unconscionability "irrespective of whether Thompson's conduct was technically fraud on the Court." It was, however, Thompson's response to this motion that determined the approach subsequently taken by Pumphrey and by the district court in their handling of the motion. Quoting directly from Thompson's Memorandum in Response to Plaintiff's Motion for Summary Judgment:

> "COMES NOW the defendant K. W. Thompson Tool Company, Inc., (hereinafter 'Thompson') by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this memorandum in response to plaintiffs' Motion for Summary Judgment filed June 5, 1992.
>
> Thompson submits that there is nothing new in plaintiffs' memorandum in support of its motion, because this issue has been discussed before. The appropriate place for plaintiffs to discuss the cases and the points they bring up in this memorandum would have been in response to Thompson's motion for summary judgment which stresses the argument that fraud on the

> court, rather than some other amorphous standard, is the only basis for setting aside the original judgment. Plaintiffs failed to argue these cases and points, and failed to refute Thompson's argument in its motion for summary judgment. They should not at this late hour be allowed to rewrite their response brief in the form of a summary judgment pleading."

Having identified the issues raised by Pumphrey in her motion with those raised by Thompson's prior arguments that no fraud had occurred, Thompson then embarked upon a nine page analysis of fact in which, among other points, it denied for the fifth time that any fraud had been committed or that the evidence presented at the original trial was false. Its argument set forth a new analysis of the record of the original trial proceeding to explain why its evidence in that proceeding had been truthful. It also included at least one express reference to deposition testimony of Thompson's employees concerning their activities and state of mind and indirect references to more of their deposition testimony by means of references to prior briefing, all of which belies Thompson's claim on page 16 of the Petition that the district court never heard that evidence. Thompson concluded its argument, literally in the last words in its response, with the remark that "if plaintiffs cannot prevail on their allegations that there was fraud on the court, they cannot set aside the 1982 judgment."

Pumphrey responded to Thompson's analysis by expanding her arguments to deal with the issue of fraud. In her reply memorandum, she stated:

> "Viewing the case at bar strictly as a claim for fraud, Plaintiffs' evidence shows that Bartlett, whether as a lawyer or a layman, participated in a conspiracy with Robert Gustafson and Ken French to conceal evidence, to give false testimony and to influence the testimony of its expert witnesses and those of the Plaintiffs by their actions. Under [*Chicago, Rock Island and Pacific Railway v. Callicotte*, 267 F. 799 (8th Cir. 1920)], this is sufficient, if proved, to warrant setting aside the judgment on account of fraud, regardless of Bartlett's status."

The point of this discussion is that Thompson itself changed the terms of Pumphrey's arguments to the trial court from "unconscionability" to "fraud." Pumphrey responded in kind. Thompson did not thereafter request more time or a further opportunity to rebut Pumphrey's new argument. In its opinion, the district court dealt with Pumphrey's motion for summary judgment in the precise terms that Thompson itself asserted that it should be considered.

It is perhaps for this reason that, in its motion to alter or amend filed on May 17, 1993, Thompson failed to identify one shred of evidence that the district court failed to consider in its Memorandum, Decision and Order of May 4, 1993, set forth in full on pages 21a through 68a of the Petition. In denying Thompson's motion, in an opinion dated February 11, 1994, set forth in full on pages 12a through 21a of the Petition, the district court made specific note of that fact. *See* the Petition, p. 14a. The Ninth Circuit made the same

observation in the course of its opinion deciding Thompson's appeal. *See* the Petition, p. 5a, n. 1.

REASON FOR DENYING THE WRIT

A. Considered In Context Of The Entire Record, This Case Does Not Present The Question Asserted By Thompson On Page i of the Petition.

In its motion to alter or amend filed with the district court on May 14, 1993, Thompson asserted that the district court's decision of May 4, 1993, was entered *sua sponte*. Pumphrey was content, at that time, to allow Thompson to make this assertion, because she was convinced that the assertion would lead nowhere. Given Thompson's lengthy arguments on the issue of fraud and its failure to identify any factual issue overlooked by the district court, Thompson had no chance of winning, in the Ninth Circuit, any argument based on the "*sua sponte*" issue. The later rulings by the district court and Ninth Circuit on that issue vindicated her judgment. *See* pp. 5a and 14a of the Petition.

Thompson now seeks to challenge that Ninth Circuit authority by suggesting that this Court should expressly adopt a different set of rules. Because Pumphrey does not know what rules Thompson will propose, she is no longer willing to assume for purposes of argument that the district court's judgment in this case was truly entered *sua sponte*.

As explained in the Statement of the Case, this is not a case in which the district court surprised Thompson with a theory that had not been fully briefed by that

party. Indeed, Thompson had raised the issue to the district court on five different occasions, including its own motion for summary judgment. Moreover, in responding to Pumphrey's motion for summary judgment, Thompson itself contended that Pumphrey was merely rearguing the issue of fraud and provided an additional nine pages of briefing to explain why no fraud had occurred. Thus, contrary to the thrust of the Petition, Thompson itself bridged the gap between Pumphrey 's original arguments regarding unconscionability and the question of fraud. The district court merely took Thompson at its word and decided the issue as Thompson presented it.

So far as Pumphrey is concerned, Thompson really complains here about its success in changing the focus of Pumphrey's motion from unconscionability to fraud. Thompson's assertion that it had no notice of the issues that the trial court was considering and no opportunity to brief them is flatly contradicted by the fact that Thompson itself defined those issues. The trial court merely decided them. If there was any error in doing so, Thompson invited the mistake. Invited error should not be grounds for granting certiorari.

B. There Is No Conflict Among The Circuits On the Issue Really Presented By This Case.

Pumphrey has reviewed each of the cases cited by Thompson in its Petition, and none presents a factual scenario like that of this case, in which (1) a party moved for summary judgment on one issue, (2) the party opposing that motion redefined the moving party's argument

to address a second issue and (3) the district court granted the summary judgment on the issue identified by the party opposing that motion. This case thus appears to be unique among reported decisions. *See* Section D of this argument. For that reason, it cannot be said that there is a conflict among the Courts of Appeal on the issue presented by this case.

Moreover, notwithstanding the fine catalogue of cases by Thompson in the Petition, any division among the Circuit Courts of Appeal on the issue of *sua sponte* summary judgments is more apparent than real. The emphasis of the words may differ. But, in the final analysis, the bottom-line issue is always whether the party who was the "victim" of the summary judgment that was entered *sua sponte* was prejudiced. If not, the summary judgment will be upheld; if so, it will not.

This is true even in the circuits which Thompson has described as requiring notice in each and every instance. For example, in *Moody v. Town of Weymouth*, 805 F.2d 30 (1st Cir. 1986), the First Circuit, which Thompson claims on page 8 of the Petition to have adopted a "bright-line" approach that always requires notice, upheld a *sua sponte* summary judgment because the "victim" could demonstrate no prejudice, concluding that this was more "sensible" than a pointless remand. With due respect to Thompson, this result does not evidence a bright-line approach.

In *American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), the Third Circuit, another court claimed by Thompson on page 8 of

the Petition to uphold a "bright-line" rule, upheld a summary judgment entered *sua sponte* without notice on the grounds that the "victim" had waived the notice provisions of Rule 56 of the Federal Rules of Civil Procedure. As in *Moody*, this result is contrary to that of a bright-line approach.

Notwithstanding Thompson's description of the case, *United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731 at 735, n. 3 (4th Cir. 1989), expressly recognizes an exception to the notice requirements of Rule 56, citing *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866 (9th Cir. 1985), an implicit reference to the Ninth Circuit's position that the "victim" must have a full and fair opportunity to ventilate the relevant issues. It is evident that the Fourth Circuit has hardly adopted a bright-line approach.

Finally, in *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386 (7th Cir. 1981), the Seventh Circuit stated that the failure to provide the notice required by Rule 56 did not necessarily mandate reversal. Once again, the result contradicts Thompson's claim of a bright-line approach.

These examples dispose of Thompson's claim that the First, Third, Fourth and Seventh Circuits have adopted the position that notice is always required. Since Thompson itself concedes, on pages 10 through 12 of the Petition, that the Second, Fifth, Sixth, Eighth and Eleventh Circuits approach the question of summary judgments granted *sua sponte* on a case-by-case basis, there is no point to analyzing authority from those courts. Pumphrey notes, in passing, that the Eleventh Circuit itself

conducted a similar survey of the courts in *Jones v. Automobile Ins. Co. of Hartford, Conn.*, 917 F.2d 1528 (11th Cir. 1990), concluding that most of the circuits did not strictly enforce the notice requirements of Rule 56. Thompson itself has noted that, in an opinion issued after *Jones*, the Eleventh Circuit itself dispensed with that notice when doing so could be described as "harmless error." *See Capuano v. United States*, 955 F.2d 1427 (11th Cir. 1992).

A review of these cases shows that most, of not all, of the circuits dispense with the notice required by Rule 56 when the party opposing the summary judgment cannot show that evidence supporting his position was excluded by the district court. Whatever the terms by which they have done so, the substance of their positions is the same as the Ninth Circuit's requirement of a "full and fair opportunity to ventilate the issues involved." *See United States v. Grayson*, 879 F.2d 620 (9th Cir. 1989). Thus, the Ninth Circuit is not nearly so extreme as suggested by Thompson, and the so-called "unnecessary and intolerable" conflict among the circuits exists, at worst, only on paper in the choice of words. Resolving such a chimerical conflict is hardly worth the time of this Court.

C. Attempting To Decide This Case Will Inevitably Involve The Court In Deciding Questions Of Fact Rather Than Issues Of Law.

In the proceedings below, as explained in Section A of the argument, it was easier and more practical to assume, without actually deciding, that the judgment entered by the district court was done *sua sponte*. for that reason, the Court will not have the benefit of any findings

of fact on, or analysis of, this issue by either the district court or Ninth Circuit Court of Appeals. To address Thompson's argument, the Court will have to analyze a lengthy record to decide the preliminary question of whether the summary judgment of May 4, 1993 was entered *sua sponte*. In so doing, it will have to be its own finder of fact.

Moreover, for the reasons explained in Section B of the argument, Thompson should be required to make some showing of prejudice, *i.e.*, issues of fact that were overlooked by the district court and that could lead to a different result. Otherwise, this Court will find itself addressing a question that is of no practical consequence whatsoever, because in the absence of prejudice, there is only harmless error or a pointless remand. Pumphrey doubts that certiorari is granted for those purposes.

Whether Thompson can point to some evidence that the district court failed to consider was a question that both the district court and the Ninth Circuit evaluated very carefully. Thompson's present complaints to the contrary, *see* p. 16 of the Petition, neither court found a scrap of evidence that the district court had overlooked in its original decision. *See* pp. 5a and 14a of the Petition.

In this Petition, Thompson essentially requests this Court to reanalyze a record that has already been studied by the Ninth Circuit Court of Appeals and the district court to find something that they failed to consider in deciding this case in Pumphrey's favor. This Court usually does not grant certiorari to review evidence and discuss factual issues. *United States v. Johnson*, 260 U.S. 220, 227 (1925).

D. Viewed In Context Of The Record And The Slight Differences Among The Circuit Courts Of Appeal, This Case Is Not Worthy Of Certiorari.

Rule 10 of the Rules of the Supreme Court declares the petitions for certiorari are granted only for compelling reasons to address important issues of law. Such issues do not arise from peculiar factual circumstances that are not likely to recur. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955).

As noted in Section B of this Memorandum, Thompson has not identified a single case that is comparable to the case at bar on its facts. It is therefore evident that any decision by the Court in this case would be of limited precedential value to the district courts and circuit courts. This is particularly true in light of the factual issues described in Section C. Those questions show that any decision by this Court would be limited virtually to the facts, *i.e.*, whether the district court's judgment was really *sua sponte* and whether Thompson has shown any prejudice on the facts.

Moreover, even if the peculiar circumstances of this case are assumed away, Thompson has not offered anything more than its own say-so to explain why the issues raised by the Petition should be decided by this Court. The positions of the different circuits are remarkably uniform, and the case-by-case approach to which they have gravitated is a sensible one. In short, no one needs a definitive ruling by this Court. Without such a need, there is no compelling reason to grant certiorari.

CONCLUSION

Certiorari should be denied.

Respectfully submitted this 31 day of January 1996.

W. ANTHONY PARK
PARK REDFORD THOMAS & BURKETT
702 West Idaho Street, Suite 310
P.O. Box 2188
Boise, Idaho 83701-2188
(208) 345-7800

JEFFREY A. STROTHER
Counsel of Record
LOJEK & STROTHER CHARTERED
305 West Fort Street
P.O. Box 1712
Boise, Idaho 83701-1712
(208) 343-7733

Attorneys for Respondent Susan R. Pumphrey

(3)

Supreme Court, U.S.
FILED
FEB 13 1996
CLERK

No. 95-1054

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

K.W. THOMPSON TOOL COMPANY, INC.,
Petitioner,

v.

SUSAN R. PUMPHREY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM

Of Counsel:

WARREN E. JONES
NEIL D. MCFEELEY
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
300 North Sixth Street
Boise, Idaho 83701
(208) 344-8535

DANIEL W. NELSON
GIBSON, DUNN & CRUTCHER

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY MEMORANDUM 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:	Page(s)
American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co., 62 F.3d 574 (3d Cir. 1995)	6
Burns v. United States, 501 U.S. 129 (1991)	7
Chambers Dev. Co. v. Passaic Counties Util. Auth., 62 F.3d 582 (3d Cir. 1995)	5
Citizens Bank v. Stumpf, 116 S. Ct. 287 (1995).	2
Demarest v. Manspeaker, 498 U.S. 184 (1990)	2
Jardines Bacata, Ltd. v. Diaz-Marquez, 878 F.2d 1555 (1st Cir. 1989)	4
Jones v. Automobile Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990)	7
Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990)	2
Moody v. Town of Weymouth, 805 F.2d 30 (1st Cir. 1986)	6
United States v. Grayson, 879 F.2d 620 (9th Cir. 1989)	1,2,6
United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989)	5
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	2
Statutes and Rules:	
Fed. R. Civ. P. 56	*passim*

REPLY MEMORANDUM

Petitioner K.W. Thompson Tool Company, Inc. ("Thompson") respectfully files this reply to respondent's brief in opposition to Thompson's petition for a writ of certiorari.

1. Respondent's main argument in opposition to certiorari is that the district court did not "really" enter summary judgment *sua sponte* with respect to the fraud upon the court issue in this case. *See* Opp. at 1, 5. Respondent, however, all but admits that she has waived this argument, which, in any event, is flatly contradicted by the record below.

a. As respondent candidly concedes, she was fully "content" to accept Thompson's characterization of the district court's summary judgment ruling on the fraud upon the court issue as "*sua sponte*" in both the district court and the Ninth Circuit. Opp. at 5. In her brief in opposition to Thompson's Motion to Alter or Amend the Judgment, for example, respondent contended that the district court "had authority to enter summary judgment *sua sponte* on the grounds that fraud was perpetrated on the Court," and devoted the first section of her brief to discussing the Ninth Circuit's exception to Fed. R. Civ. P. 56(c)'s notice and hearing requirements for *sua sponte* summary judgment as articulated in *United States v. Grayson*, 879 F.2d 620 (9th Cir. 1989). *See* Plaintiffs' Objection To Defendant's Motion To Alter Or Amend The Judgment Or, In The Alternative, To Amend Findings at 2-4. Likewise, the first section of respondent's Ninth Circuit brief was entitled "The District Court Did Not Err In Granting Summary Judgment On A Theory Not Advanced By [Plaintiff]," and again relied exclusively upon the Ninth Circuit's *Grayson* decision.

Appellee's Brief (9th Cir.) at 6-8. The Ninth Circuit agreed, applying *Grayson* to affirm the district court's judgment that Thompson committed a fraud upon the court, even though respondent "did not specifically move for summary judgment on this ground." Pet. App. at 5a n.1.

Respondent nonetheless now declares that "she is no longer willing to assume" that the district court entered summary judgment *sua sponte*. Opp. at 5. But having failed to raise the issue -- and, in fact, having successfully asserted the opposite position -- in the courts below, respondent has waived the issue. She cannot raise it in this Court for the first time. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 (1990) (stating that a respondent may "'defend . . . [the] judgment on any ground *properly raised below*,'" and finding that respondent had waived argument by failing to present it below) (emphasis added) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)); *accord Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1990); *Citizens Bank v. Stumpf*, 116 S. Ct. 286, 291 n.** (1995).

b. Irrespective of her waiver problem, respondent simply cannot overcome the unambiguous record below, which reveals that the district court did, in fact, grant summary judgment *sua sponte* against Thompson on the fundamental issue in this case -- fraud upon the court -- without providing Thompson notice or an opportunity to be heard. Respondent cannot point to any place in the record where the district court provided any notice of its intent to enter summary judgment on the fraud upon court issue because the district court never did so. Moreover, respondent concedes that she did not move for summary judgment on the fraud upon the court issue. *E.g.*, Opp. at 2. Indeed, respondent vigorously opposed Thompson's motion for summary judgment on that issue. She therefore has no choice but to "accept" (*id.* at 1)

Thompson's statement that respondent "disputed a host of material issues of fact relating to her fraud upon the court allegations." Petition at 5.

As respondent also recognizes, her summary judgment motion, on its face, emphatically disclaimed any intention to litigate the fraud upon the court issue at the summary judgment stage. Instead, her motion was based "upon the argument that she was entitled to relief on the grounds of unconscionability 'irrespective of whether Thompson's conduct was technically fraud on the Court'." Opp. at 2 (quoting respondent's Memorandum Supporting Motion for Summary Judgment at 2).

Although respondent in this Court for the first time advances the highly peculiar argument that Thompson's opposition to her summary judgment motion somehow "changed the terms of [respondent's] arguments to the trial court from 'unconscionability' to 'fraud,'" Opp. at 5, the record below shows the opposite. Thompson's opposition to summary judgment explicitly made clear its understanding that respondent intentionally was *not* seeking summary judgment on the fraud issue, declaring:

> The thrust of plaintiff's legal argument appears to be that the original judgment in this case should be set aside if the result is "unconscionable" *even if there were no fraud.* The plaintiffs, *apparently recognizing that they are unable to make out a case that fraud occurred in the original trial,* are asking the Court to conclude that "unconscionable conduct is *by itself* a reason for setting aside the original judgment *regardless of whether that conduct technically amounts to a fraud on the court.*"

Thompson's Memorandum in Response to Plaintiff's Motion for Summary Judgment at 11 (emphasis added).

Respondent's reply brief did not in any way suggest that the terms of her motion had been "changed" by Thompson's opposition. Rather, she forcefully reiterated that her motion "assum[ed] that Thompson's conduct was *not* fraudulent." Plaintiff's Reply Memorandum Supporting Motion for Summary Judgment at 15 (emphasis added).

In short, respondent did not seek summary judgment on the issue of fraud upon the court and, therefore, neither party had any inkling that the district court might grant summary judgment against Thompson on that basis.[1] The question whether Rule 56 permits entry of summary judgment against a party *sua sponte* without providing notice and an opportunity to oppose summary judgment is thus squarely presented by this case and should be resolved by the Court.

2. Respondent contends that the conflict among the circuits on the question presented is "more apparent than

---

[1] Respondent's suggestion that Thompson's own motion for summary judgment put it on notice that summary judgment could be entered against it is baseless. *See* Petition at 4-5, 18 n. 9; *see, e.g., Jardines Bacata, Ltd.* v. *Diaz-Marquez*, 878 F.2d 1555, 1561 & n.7 (1st Cir. 1989) (holding that district court's failure to provide notice was improper where plaintiff had moved for summary judgment yet district court *sua sponte* entered summary judgment in favor of defendant). Thompson had no motive or opportunity to oppose summary judgment on the fraud upon the court issue, a process that would have involved submission of a statement of material disputed facts and opposing affidavits from its witnesses, who were deposed by respondent but not by Thompson, and who never had a chance to explain their side of the story to the district judge. Opposing summary judgment obviously also would have involved a whole different set of legal arguments, including the argument that where, as here, intent is a crucial issue in the case, summary judgment is not appropriate. *See* Petition at 16 n.6.

real." Opp. at 7. If anything, however, respondent's discussion of the conflict actually shows that the division and confusion in the circuits are even worse than Thompson has described. *See* Petition at 6-13.

Respondent inexplicably argues that the Fourth Circuit in *United States Dev. Corp.* v. *Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731 (4th Cir. 1989), "implicit[ly]" endorsed the Ninth Circuit's rule that district courts need not provide advance notice before entering summary judgment *sua sponte* against a party. Opp. at 8. But no fair reading of that decision could possibly yield such an interpretation. The Fourth Circuit squarely held that the power to grant summary judgment *sua sponte* "is contingent on giving the losing party notice. . . . [T]his notice . . . should provide the full ten days called for by Fed. R. Civ. P. 56(c)." *Id.* at 735 (citations and footnotes omitted).[2] Thus, the Fourth Circuit's rule strictly requiring notice before *sua sponte* grants of summary judgment directly conflicts with the Ninth Circuit rule that such notice is not required.

Respondent's characterization of the Third Circuit's bright-line rule, which likewise conflicts with the Ninth Circuit's position, is equally erroneous. The Third Circuit has repeatedly and clearly mandated that "a judgment cannot be entered without first placing the adversarial party on notice that the court is considering a *sua sponte* summary judgment motion." *Chambers Dev. Co.* v. *Passaic Util. Auth.*, 62 F.3d 582, 584 n.5 (3d Cir. 1995).

---

[2] The Fourth Circuit did cite a Ninth Circuit case in a footnote, but merely for the proposition that "in extraordinary circumstances" a court may give less than ten days notice of its intent to enter summary judgment *sua sponte*. 873 F.2d at 735 n.3.

As respondent points out, Opp. at 7-8, the Third Circuit has held that the right to notice under Rule 56(c), like other rights, can be waived by a litigant's failure to raise the issue. That unremarkable holding, however, is not at all "contrary to that of a bright-line approach." Opp. at 8. The Third Circuit has established a hard and fast rule that notice is required because "orders granting summary judgment *sua sponte* endanger important rights and, unless waived . . . are likely to result in judicial inefficiency and deprivation to the rights of one of the parties." *American Flint Glass Workers Union, AFL-CIO* v. *Beaumont Glass Co.*, 62 F.3d 574, 578 n. 5 (3d Cir. 1995).

Respondent does not dispute that the most recent decisions of the First, Seventh and D.C. Circuits also have announced a bright-line rule requiring that notice must always be provided under Rule 56 before a *sua sponte* entry of summary judgment. *See* Petition at 8-9. While respondent cites a 1981 decision from the Seventh Circuit and a 1986 First Circuit decision that applied rules more closely resembling the Ninth Circuit's position, Opp. at 7-8, she says nothing about the subsequent decisions cited by Thompson, which announce the strict notice requirement and thus conflict with the Ninth Circuit's *Grayson* rule. To the extent that the older decisions relied upon by respondent are still good law -- at best, a doubtful proposition -- they are only relevant insofar as they further demonstrate the state of disarray that pervades the circuits on the question presented by this case.[3]

---

[3] One of the cases cited by respondent, *Moody* v. *Town of Weymouth*, 805 F.2d 30 (1st Cir. 1986), involved the slightly different question whether notice is required before a district court converts a motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 12(b)(6), which, unlike Rule 56(c), does not include an express notice requirement. But even

Perhaps because there is nothing she can say to reconcile them, respondent does not even attempt to address the decisions of the Second, Fifth, Sixth, Eighth and Eleventh Circuits cited by Thompson. Between them, these five circuits have, in the last six years, applied at least six different rules concerning the question whether Rule 56(c) requires that notice be provided before *sua sponte* entry of summary judgment. *See* Petition at 10-13. The conflict is longstanding and has been getting worse with the passage of time. This Court's intervention is manifestly warranted.

3. Finally, respondent contends that this case presents the Court with a fact-bound question that is not important. Opp. at 9-11. But that is flatly incorrect. The question presented is clearly important. *See* Petition at 14-21; *cf. Burns v. United States*, 501 U.S. 129, 138 (1991) (holding district court's *sua sponte* departure from sentencing guidelines improper without first providing notice and noting that dispensing with notice would have required the Court to confront "the serious question whether notice . . . is mandated by the Due Process Clause."). The question also is a purely legal one: whether the plain language of Rule 56, which requires 10-days notice of a motion for summary judgment, requires notice before a court enters summary judgment *sua sponte*. The Court need not consider any facts to decide this question, which is vital to

---

with respect to that specific issue, the circuits are divided. *See, e.g., Jones* v. *Automobile Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1533 (11th Cir. 1990) (canvassing conflicting decisions, concluding that notice is "of the utmost importance" and "a valuable procedural safeguard" and holding that district courts must provide 10-days notice of intent to convert a Rule 12(b)(6) motion to dismiss into a motion for summary judgment).

the fair and efficient administration of federal civil justice, and recurs constantly, as demonstrated by the many conflicting decisions cited by both Thompson and respondent.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant certiorari and set this case for plenary consideration.

February 13, 1996

Respectfully submitted,

*Theodore B. Olson
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

*Counsel of Record

Of Counsel:

Warren E. Jones
Neil D. McFeeley
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
300 North Sixth Street
Boise, Idaho 83701
(208) 344-8535

Daniel W. Nelson
GIBSON, DUNN & CRUTCHER